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# Doing Business in...

Turks & Caicos  
Misick & Stanbrook

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# 2019

## Law and Practice

*Contributed by Misick & Stanbrook*

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**Misick & Stanbrook** is one of the longest-established and best-known firms in the Turks and Caicos Islands (TCI). The firm is highly regarded for its abilities in corporate and commercial, tourism and resort development, IP and commercial litigation, and is the TCI member of Lex Mundi, Terralex and World Services Group. Misick & Stanbrook

has recently acted on a multimillion-dollar acquisition of a regulated company in administration, on the AIM listing of an international oil exploration company and on the development and construction of the largest hospitality development currently being built in the TCI.

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## **1. Legal System**

### **1.1 Legal System and Judicial Order**

The Turks and Caicos Islands (TCI) is a British Overseas Territory. It is a common law jurisdiction modelled on the English legal system.

A Magistrates' Court sits in most of the Islands and there is an appeal process from the Magistrates' Court to the Supreme Court. The Supreme Court is similar to the High Court in England and is presided over by a single judge. The Supreme Court exercises first-instance jurisdiction in more serious criminal and civil matters that are beyond the Magistrates' Court's jurisdiction.

There is an appeal process from the Supreme Court to the Court of Appeal. Appeals can be made from the Court of Appeal to the Privy Council, which sits in England. The Privy Council is the final appellate court.

## **2. Restrictions to Foreign Investments**

### **2.1 Approval of Foreign Investments**

The TCI welcomes foreign investment. The TCI government has a successful open-arms inward investment policy that has led to dramatic growth of the economy over the last 20 years.

There are no restrictions nor specific requirements for approval for foreign investment in the TCI; however, financial services enterprises – such as trust companies, banks and captive insurance companies – are significantly regulated and there are material application and licensing requirements.

Almost all businesses in the TCI require a business licence and there are a number of categories of business licence that, except in exceptional circumstances, are limited to Turks and Caicos Islanders or that require a Turks and Caicos Islander partner (for example, retail business, car sales and building contractors). Typically, large-scale foreign investments do not face any difficulty acquiring a business licence.

The TCI has become the regional leader in luxury tourism and foreign investment in that field is particularly welcomed.

## 2.2 Procedure and Sanctions in Case of Non-Compliance

Although there are no specific approvals required for foreign investment in the TCI, a variety of TCI government permits become necessary depending on the nature and industry of the investment. Thus, almost all investments will involve the conduct of a business that will require a business licence. Physical construction will require planning approval. Regulated financial services businesses will need a licence from the Financial Services Commission (FSC). Approval for overseas staff will be necessary in the form of work permits.

If a foreign investor is undertaking a larger project then the TCI government can provide certain concessions and incentives for establishing new enterprises (or expanding existing ones) that are seen to benefit employment and the TCI's economy (under the Encouragement of Development Ordinance). The TCI government can grant relief from a variety of duties and fees, mainly on the import of materials to be used in connection with construction projects, but also on exports, along with a variety of 'comfort-and-support' promises. Generally, the level of fiscal concessions available to a foreign investor is greater for businesses based outside the main commercial island of Providenciales.

In order to apply for such concessions/incentives, the investor will make an application to the TCI government's inward investment unit, Invest Turks and Caicos. The application will include a project overview, business plan, details of financing, likely employment, likely immigration requirements, background and due diligence information on the investors, and a list of the concessions sought.

As to sanctions for non-compliance with requirements for a given permit, there are criminal penalties depending on the nature of the permit required. Where the non-compliance is in relation to a development agreement with the TCI government regarding a particular large-scale investment, see **2.3 Commitments Required from Foreign Investors**.

## 2.3 Commitments Required from Foreign Investors

The authorities condition their approval to certain commitments in relation to the granting of concessions/incentives, referred to in **2.2 Procedure and Sanctions in Case of Non-Compliance**. The level of incentives and any conditions can be subject to negotiation, and conditions could include timelines to commence and complete the specific project, certain employment criteria and any other conditions relating to the manner in which the affairs of the enterprise will be conducted, managed and operated.

The arrangement is usually memorialised in a contract between the investor and the TCI government, typically described as a 'development agreement'. Under the agreement, the developer will commit to making the specified investment to a specified minimum extent by a specified date in return for various fiscal concessions and promises of TCI government support in relation to the granting of permits, licences and immigration approvals. The TCI government will usually seek to claw back the concessions granted (for instance, by the recovery of tax forgone and the termination of the agreement) if the investor does not live up to its obligations contained in the development agreement.

As the TCI is heavily dependent on foreign investment, the TCI government habitually gives large-scale foreign investors reasonable leeway in relation to compliance with deadlines and targets specified in development agreements.

## 2.4 Right to Appeal

The granting of the aforementioned concessions/incentives is open to negotiation but only within the ambit of the Encouragement of Development Ordinance and other relevant statutes. There are legal limits to the concessions that the TCI government may grant.

If the TCI government enters into a development agreement with an investor and breaches it then it may be sued for breach of contract and there are frequently occasions where decisions of officials and boards of the TCI government are subject to judicial review. However, the TCI government has significant latitude in relation to the types or source of investment that it may favour with a development agreement. Claims by investors who have not been favoured with the grant of a development agreement are almost unheard of.

However, a development agreement is not a condition of making foreign investment in the TCI: a resort developer or a financial services house that sought to make an investment in the country but that was refused a relevant permit (such as a planning approval or a trust company licence) would typically have a right of appeal under the statute governing applications of those types. Moreover, the TCI government official or board issuing the refusal is bound by the usual principles of administrative law in relation to its consideration of the application for the licence or permit concerned and could be the subject of judicial review on that account.

# 3. Corporate Vehicles

## 3.1 Most Common Forms of Legal Entities

Subject to the obtaining of any necessary business licence or other regulatory consents (the latter particularly in the case of financial services), the main business vehicle available to foreign investors in the TCI is the company limited by shares. It is also possible to form companies limited by

guarantee (with or without a share capital), protected cell companies and limited partnerships, although none of those vehicles is routinely used by such investors.

## **Companies Limited by Shares**

The TCI Companies Ordinance was wholly revamped and modernised in 2017 and largely follows the internationally successful British Virgin Islands model. The most commonly used investment vehicle is the company limited by shares, where the liability of the shareholder is usually limited to the amount unpaid on the shares issued to that shareholder (generally, nil or a nominal sum). One director and one shareholder are required, and their nationality is not restricted (subject to their not being from a country that is subject to UN or other international sanctions). Corporate directors are permitted. Such a company may have an authorised share capital but it is not required to, and shares may be issued with or without par value.

## **Limited Partnerships**

Under the TCI's Limited Partnerships Ordinance, a limited partnership (LP) is formed with at least one general partner and one limited partner. The limited partners take no role in the LP's management: that aspect is conducted by the general partner. The limited partner has no liability for the LP's debts in the event of its insolvency beyond the amount of his capital contribution, unless he takes part in its management. Otherwise, all liability rests with the general partner (who will typically itself be a limited company, because of that).

LPs are not widely used for foreign investment in the TCI except as holding vehicles for shares of limited companies that are themselves carrying out the investment.

## **Other Entities**

Guarantee companies limit the liability of members to an amount specified in the articles (typically nominal). There are usually no shares, but rather membership, which will end in specified circumstances such as death or (in the case of corporate owners) dissolution. Guarantee companies are not widely used for foreign investment in the TCI: they are most common as vehicles for associations or similar non-commercial enterprises.

It is also possible to establish protected cell companies (PCCs). A PCC is a limited company that comprises one or more separate cells that operate for the purpose of protecting and segregating assets. The assets of a particular cell are not available to meet claims of creditors in relation to the assets of other cells or non-cellular assets. Shares in a PCC may be issued in respect of a particular cell and dividends may be paid on such shares without regard to the profit portion of other cells. A PCC may be incorporated only with the approval of the FSC and must carry on insurance business within the meaning of the TCI Insurance Ordinance.

Trusts are permissible under TCI law, but a trust is not generally regarded as a vehicle through which to conduct direct business (although a trust is frequently the owner of a company that itself conducts business).

Joint ventures are generally created by having either (i) a shareholders' agreement between the investors in the case of a company limited by shares, or (ii) a limited partnership agreement in the case of an LP.

## **3.2 Incorporation Process**

A company can be incorporated within two or three days of delivery of incorporation documentation to the companies registry. The documents to be delivered include an incorporation application and the proposed articles of incorporation. The articles will specify the identity of the initial registered agent (who must be a locally licensed company manager) and the location of the registered office, as well as the share structure. The first registered agent appoints the first director(s).

## **3.3 Ongoing Reporting and Disclosure Obligations**

Private companies in the TCI are subject to a variety of reporting and disclosure requirements. Thus, details of (and any changes in) the following must be filed with the companies registry:

- registered office;
- registered agent;
- directors; and
- members.

There is no obligation to file accounts or an annual return; however, there is an annual registration fee payable to the companies registry.

There is also a requirement to file details of beneficial ownership and changes in the beneficial owners. Neither that information nor details of shareholders is publicly searchable. The beneficial ownership information is held by the FSC on an air-gapped server and may be disclosed by it only to the TCI police or to an authority prescribed in regulations.

Disclosure is also required to the companies registry in relation to various other corporate events, including alteration of the articles, mergers, arrangements and liquidations.

## **3.4 Management Structures**

A TCI company is managed by its directors. The directors may appoint executive officers: CEO, CFO, COO and the like. There is no obligation to appoint a corporate secretary. Delegation to committees is also permissible.

## **3.5 Directors', Officers' and Shareholders' Liability**

Directors have both fiduciary obligations and obligations of skill and care to the company. A director who is party to a

fraud or to the commission of any tort may be personally liable to the injured party. Generally speaking, directors are not personally liable for the debts, liabilities or obligations of a company except for those debts, liabilities or obligations that arise out of negligence, fraud or breach of duty on the part of that director, or out of an action not within his authority and not ratified by the company. A director may also be held personally liable for debts of the company contracted when it had no member.

The Companies Ordinance also imposes criminal penalties on directors for a number of offences. In the absence of a criminal offence, directors' duties are largely enforced by civil remedies.

The Insolvency Ordinance sets out certain liabilities that may arise as a result of a director's conduct. These include liability for fraudulent trading, fraudulent conduct and insolvent trading, and the provisions include summary remedies against delinquent officers (including directors).

As between the company and a shareholder, the shareholder's liability is limited to:

- any amount unpaid on a share held by the shareholder;
- any liability expressly provided for in the company's articles of incorporation; and
- any liability to repay a distribution.

## 4. Employment Law

### 4.1 Nature of Applicable Regulations

The TCI has a comprehensive statutory regime governing the employment relationship, primarily in the Employment Ordinance and ancillary legislation and regulations.

Matters covered include:

- employment contracts and what must be included in them;
- employment aspects on the sale of a business;
- maternity leave;
- itemised pay statements;
- permitted deductions from wages;
- overtime and maximum hours of work;
- minimum wage;
- vacation;
- sick leave;
- redundancy and severance pay;
- unfair and wrongful dismissal;
- records and notices;
- notice periods;
- disciplinary procedures;
- discrimination; and
- victimisation.

There are currently no trade unions in the TCI and there are no collective bargaining provisions. The legislative regime is employee-friendly and, except in cases of gross misconduct, a variety of disciplinary procedures should be followed, failing which a dismissal may be held to be unfair.

### 4.2 Characteristics of Employment Contracts

An employee must be given a contract setting out the terms of employment within seven days of starting work. The contract of employment can be:

- for a fixed term;
- for a specific task;
- for a probationary period of no more than three months; and
- without reference to any time limits.

In addition, it must specify the:

- identity of the parties;
- date on which employment began;
- date on which continuous employment began, taking into account employment with previous employers that counts towards that period;
- scale of remuneration; and
- terms and conditions of work.

### 4.3 Working Time

The normal hours of work of an employee shall not exceed 44 hours a week.

### 4.4 Termination of Employment Contracts

Termination of an employee's employment must be fair. To be fair, the employer must show the Labour Tribunal that the termination is for any one of the following reasons:

- the employee's capability or qualifications for the job;
- the employee's conduct;
- redundancy;
- the fact that the employment could not continue without contravention of a duty or restriction imposed by another ordinance; or
- some other substantial reason.

The law in relation to unfair dismissal is very similar to that in England. If the employer meets this requirement, the Labour Tribunal will decide whether a dismissal is fair or unfair depending on whether it deems the employer's reason for dismissal as sufficient in the circumstances.

An employee must be given notice of termination, unless he is dismissed for serious misconduct (for example, gross insubordination or dishonesty) and therefore it would be unreasonable to require the employer to continue the employment relationship.



A person who is continuously employed for one month or more is entitled to the following notice periods:

- one week's notice if his period of employment is less than two years;
- one week's notice for each year of continuous employment if he has been continuously employed for between two and 12 years; or
- 12 weeks' notice if his period of continuous employment is 12 years or more.

Unless contractually bound, dismissed employees have no continuing obligations to the employer once they have left.

If a dismissal is fair, an employee is not entitled to any payments other than for entitlements that have previously accrued but are unpaid at the date of dismissal.

An employee who is unfairly dismissed can take proceedings against the employer (i) in the Labour Tribunal for remedies prescribed by the Employment Ordinance or (ii) in the courts for wrongful dismissal or breach of contractor discrimination.

The Tribunal can make an order of:

- a basic award;
- reinstatement;
- re-engagement; or
- compensation, up to a maximum of USD35,000.

Victims of discrimination have civil remedies available to them, including (i) damages and (ii) re-engagement or reinstatement.

Before an employee can be made redundant, the employer shall do the following.

- Supply the recognised trade union or, if none exists, the employees' representative with relevant information as early as possible on, amongst other things:
  - (a) the existence of the circumstance giving rise to the redundancy;
  - (b) the reasons for the contemplated redundancy;
  - (c) the number and categories of employees likely to be affected; and
  - (d) the period over which the redundancy process is likely to be carried out.
- Consult as early as possible with the recognised trade union or, if none exists, the employee's representative, on:
  - (a) the possible measures that could be taken to avert or minimise the adverse effects of the situation giving rise to the redundancy;
  - (b) the possible measures to be taken to mitigate the adverse effects of any redundancy on the employees concerned; and

(c) the pool from which the employees to be made redundant are to be selected should include all of the employees carrying out work of the particular kind that has ceased or is being diminished, but may be widened to include other employees such as those whose jobs are similar to, or interchangeable with, those employees.

Once the pool of employees has been determined, it is for the employer to decide the selection criteria to determine who within the pool will be made redundant (unless the whole pool is to be let go).

Whilst it is for the employer to establish the selection criteria, those criteria must be objective and might include considerations such as:

- last in/first out;
- efficiency;
- experience;
- skill/qualification;
- attendance records; and
- the need to retain a balanced workforce.

There should be individual consultation with those individuals provisionally selected for redundancy, for the purpose of allowing them to explain their own personal situations or to give them an opportunity to comment upon their possible selection.

Also, the employer should consult with the employees concerned as to possible alternative employment in its organisation.

Employees who have been employed for two years or more are, in a redundancy, entitled to severance pay of two weeks' wages for each year of service. This is pro rated for an incomplete year.

## **4.5 Employee Representations**

Employees are entitled to have a trade union (although none currently exists) or an employees' representative. As referred to above in relation to redundancy, the consultation with the employees' representative is material in relation to the redundancy procedure. Moreover, employees are entitled to representation and disciplinary procedures, and to be properly informed in the course of disciplinary procedures (for instance, by means of verbal warning, written warning, final warnings and the like).

There is no legal entitlement for employees to be represented on company boards, or for them to have any say in major business decisions.

## 5. Tax Law

### 5.1 Taxes Applicable to Employees/Employers

There is no income tax in the TCI. There is a liability to the following.

- National Insurance contributions: there is a total liability amounting to 8% of the employee's earnings up to USD4,000 per month, with 4.6% to be paid by the employer and 3.4% by the employee.
- National Health Insurance contributions amounting to 6% of the employee's earnings up to USD7,800 per month. Of that 6%, 3% is to be paid by the employer and the other 3% by the employee.

### 5.2 Taxes Applicable to Businesses

The TCI has no direct taxation. There are no corporate, income, capital gains, value-added, sales, turnover or profits taxes.

There are, however, several indirect taxes, including:

- stamp duty payable on transfers of TCI real estate, of up to 10% of the consideration;
- share transfer duty payable on the transfer of equity capital of TCI landholding companies of 8% of the fair market value of the underlying TCI real estate;
- customs duty on imported goods;
- customs processing fees (effectively a tax); and
- hotel, accommodation and tourism tax on accommodation, food and beverages supplied in designated establishments and on tourism services.

These taxes are consumption based and arise on the relevant transaction or consumption.

### 5.3 Available Tax Credits/Incentives

There are tax incentives available for major foreign direct investment (see 2. **Restrictions to Foreign Investments**). Tax credits are not material given that the TCI has no direct taxes.

## 6. Competition Law

### 6.1 Merger Control Notification

Whilst the TCI Companies Ordinance facilitates mergers and consolidations, there are no material competition rules or restrictions and so there are no specific merger control requirements.

In respect of a statutory merger, a TCI company can merge with one or more companies, be it a TCI company or a foreign company. The end result of such a merger will be one TCI company in place of the two or more previous entities.

In addition, (i) mergers by way of a plan of arrangement or a scheme of arrangement approved by the majority shareholders and/or creditors and by an order of the TCI court are permitted, and (ii) the Companies Ordinance provides for limited minority squeeze-out procedures.

The statutory merger regime requires only board approval and any necessary resolutions required by the company's articles of incorporation. Once the merger is approved and the required documents filed, then the Companies Registrar shall register the merger.

Of course, the above does not preclude the traditional and more typical options of asset acquisition or takeover.

Whilst there is no formal merger control, the rules relating to business licensing will apply.

### 6.2 Merger Control Procedure

Please see 6.1 **Merger Control Notification**.

### 6.3 Cartels

There are no competition laws in the TCI, other than the restraint of trade rules applicable under English common law.

### 6.4 Abuse of Dominant Position

There are no rules governing unilateral conduct and economic dependency in the TCI.

## 7. Intellectual Property

### 7.1 Patents

Under the TCI's Patents Ordinance, a patent is defined to be a patent granted under the Patents Act 1949 (UK) or under the Patents Act 1977 (UK) and means also a European patent (UK) that has effect in the United Kingdom pursuant to Section 77 of the Patents Act 1977 (UK).

#### Registration Process

The holder of a patent may apply for its registration in the TCI at any time within five years from the date of the grant of the patent in the UK. Applications are made in a prescribed form to the Registrar of Patents, a functionary of TCI's FSC, and the application shall be accompanied by: (i) in the case of a patent with a specification published in a language other than English, a copy certified by the UK Comptroller-General of Patents, Designs and Trade Marks in the United Kingdom of a translation into English of the specification; or (ii) in any other case, a copy certified by the Comptroller of the specification, together with the drawings (if any) relating to the patent and a certificate of the Comptroller giving full particulars of the grant of the patent or of its taking effect in the United Kingdom on such specification.



Once the correct documents have been received and the prescribed fees have been paid along with the cost of any prescribed advertisement, the Registrar of Patents shall enter the particulars of the patent in the register and issue a certificate of registration authenticated by his official seal.

### **Enforcement and Remedies**

Patents are enforced through initiating legal proceedings. A patent holder can sue for damages or seek an injunction to restrain the infringement of its patent rights.

### **Length of Protection**

The duration of protection is equivalent to that afforded by UK registration (typically 20 years). Therefore, if the UK registration is extended, that extension applies equally to the TCI registration.

## **7.2 Trade Marks**

### **Definition**

The TCI Trade Marks Ordinance defines a trade mark as any sign capable of being represented graphically that is capable of distinguishing the goods or services of one undertaking from those of others. Such a mark may consist of words, designs, numerals or the shape of goods or their packaging.

### **Registration Process**

An application for registration of the mark must be filed with the Registrar of Trade Marks in a prescribed form with the prescribed fee. If the Registrar is satisfied that the application meets the statutory requirements, he will publish notice of it in the TCI government Gazette. Anyone who wants to oppose the application has one month from the publication date to tender details of their objections in a prescribed form. Where there is no notice of opposition or where all opposition proceedings are withdrawn or decided in favour of the applicant for registration, the Registrar will register the mark.

### **Protection**

A trade mark must be registered with the Registrar of Trade Marks to be protected. Unregistered marks can obtain limited protection through registration as a business name in the TCI. In addition, a party using a trade name associated with another may be liable at common law for passing off.

### **Enforcement and Remedies**

The right holder's remedies in the case of infringement are to sue for damages and/or seek an injunction against the breach and further breaches.

### **Length of Protection and Renewability**

Protection lasts for ten years from the date of registration and can be renewed for successive ten-year periods. An annual fee is payable for each mark. The annual fee must be paid to avoid the mark going into abeyance.

## **7.3 Industrial Design**

The TCI does not have a regime for registration of designs or for their protection.

## **7.4 Copyright**

### **Definition and Legal Requirements**

The UK Copyright Act 1911 (Copyright Act) applies in the TCI and covers, for example, original literary, dramatic, musical and artistic works, and film soundtracks.

### **Protection**

Protection subsists automatically without the need for registration. The right holder's remedies in the case of breach are to sue for damages and/or to seek an injunction restraining the breach and further breaches.

### **Length of Protection and Renewability**

Protection lasts for the life of the author plus 50 years, unless otherwise provided by the Copyright Act.

## **7.5 Others**

Unless it falls into one of the protected categories of IP (trade mark, copyright or patent), or some common law right of action arises (such as passing off), an IP right will not have protection in the TCI.

# **8. Data Protection**

## **8.1 Applicable Regulations**

Aside from a brief reference in the Electronic Transactions Ordinance, there is no data protection statute. Common law rules regarding rights of confidentiality and privacy apply. In addition, the TCI Constitution stipulates that every person has the right to respect for his private and family life, his home and his correspondence, and is to be free from unauthorised search. Also, the TCI's Confidential Relationships Ordinance imposes statutory obligations of confidentiality regarding confidential information with respect to business of a professional nature.

The Electronic Transactions Ordinance allows the Governor to make regulations prescribing standards for the processing of personal data, whether or not the personal data originates outside the TCI. The only regulations that have been made under that statute relate to the establishment of relevant criteria for providers of certification services in relation to electronic signatures. One of the requirements is that certification service providers, whether external or those authorised under the Ordinance, must keep subscriber-specific information confidential and must abide by specified security guidelines.

## **8.2 Geographical Scope**

See 8.1 Applicable Regulations.

### 8.3 Role and Authority of the Data Protection Agency

There is no Data Protection Agency in the TCI.

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