

FOCUS

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EXTERNAL INSURANCE ACT, 2009

In response to the recent global initiatives targeting offshore financial centers, the Bahamian government has taken steps to bolster its financial services sector through the enhancement of legislation regulating offshore products that are in high demand. An example of this is evidenced by the introduction of the External Insurance Act, 2009 ("EIA, 2009"), which came into force on the 19th August, 2009. Part I of this Article is intended to introduce readers to the EIA, 2009 while Part II highlights some of the benefits of conducting external insurance business in or from within The Bahamas.

Part I - EIA, 2009

The EIA, 2009, which has repealed the External Insurance Act, 1983 as amended, modernizes the legislation and regulations applicable to external insurance business and provides a response to the demand for cost effective means of entering into captive or self insurance by small to medium sized enterprises while satisfying international standards.

Who does the EIA, 2009 apply to?

The EIA, 2009 regulates and controls the following persons involved in the provision of services relating to the offshore insurance business in or from within The Bahamas:

- Any "external insurer", being a company "carrying on external insurance business". "External insurance business" is defined as "insurance business where the risk is located outside of The Bahamas";
- Any person holding himself out as carrying on external insurance business;
- Any person providing or purporting to

provide "insurance management services" which includes "...the provision of accounting, administrative, brokerage, underwriting and claims processing in respect of external insurance business";

- Any person acting or purporting to act as an "insurance manager" providing insurance management services; or

Any "external insurance broker" which is "a company licensed under the Act, (not being an external insurer) who, for commission or other compensation brings together, with a view to carrying on external insurance business, persons seeking insurance or reinsurance and insurance or reinsurance undertakings, carries out work preparatory to the conclusion of contracts of insurance or reinsurance, and where appropriate, assists in the administration and performance of such contracts."

The persons referenced at items (i) and (ii) comprise External Insurance Companies and the persons referenced at items (iii) to (v) comprise External Insurance Intermediaries.

Regulatory Framework

The offshore insurance industry in The Bahamas is regulated by the newly established Insurance Commission of The Bahamas (the "Commission"). The EIA, 2009 empowers the Commission to license External Insurance Companies and External Insurance Intermediaries ("Licensees") and to make regulations, rules and guidelines to supervise its Licensees. The EIA, 2009, also requires every External Insurance Company, licensed by the Commission to appoint a resident representative in The Bahamas prior to commencing external insurance business.

The information contained in this newsletter is provided for the general interest of our readers, but is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. This newsletter can in no way serve as a substitute in such cases.

For additional copies of FOCUS, please contact Antonia Burrows at 242 502 5200 or at aburrows@higgsjohnson.com.

External Insurance Act, 2009 continued



The resident representative acts as the liaison between a Licensee and The Commission and maintains such books and records of the Licensee as the Commission may require from time to time. Additionally, the resident representative is required to report to the Commission its awareness of the likelihood of a Licensee being unable to pay its debts; or of its having reason to believe that certain events have occurred with respect to its Licensee, such as non-compliance with requirements of the EIA, 2009 or the Licensee ceasing to carry on business under its licence.

Licensing Procedure

The EIA, 2009 mandates that an External Insurance Company and External Insurance Intermediary must be incorporated as a company. While an External Insurance Intermediary is limited to taking the form of a company incorporated pursuant to the International Business Companies Act, 2000 or the Companies Act, 1992 (a "Bahamian Company"), the EIA, 2009 provides that an External Insurance Company may take the form of either a Bahamian Company or a company incorporated outside of The Bahamas. An application for licensing of a Company incorporated outside of The Bahamas by the Commission must be accompanied by the information specified under the EIA, 2009 including evidence that: (i) it is lawfully constituted and duly authorised and licensed to undertake insurance business in accordance with the laws of the country where it is incorporated; (ii) it has undertaken insurance business in that country for a period satisfactory to the Commission and is subject to regulations in its country of domicile under a regime which in the Commission's opinion is at least comparable to that of The Bahamas.

The Commission has the discretion to approve or refuse the application of any External Insurance Company or External Insurance Intermediary for licensing; however, if the Commission refuses a

licence, the applicant must be notified in writing of its reasons for such refusal and set out to the applicant, it or its rights to appeal the Commission's decision.

If the Commission approves an application for licensing and the External Insurance Company applying has paid the relevant fee, the Commission may designate it as either:

- a Restricted External Insurer, which is an external insurer that only underwrites the risks of:
 - its members, subsidiaries and affiliates (captive insurers);
 - reinsureds, not being members, subsidiaries and affiliates who acknowledge in writing that they know and accept that the external insurer is a restricted external insurer; and
 - such other persons as the Commission may approve; or
- an Unrestricted External Insurer which is an external insurer that is not a restricted external insurer. Moreover, the Commission may specify the class or classes of insurance business in which the Licensee may engage.

Financial Obligations

Licensees designated as either Restricted or Unrestricted External Insurers are required to maintain a minimum paid-up capital or contributed reserve fund (in the form of cash or such assets in such amounts), as may be prescribed or approved by the Commission which amount will depend on its designation.

Additionally, the Commission has the authority to prescribe that a Licensee maintain in easily realizable investments (cash, short term securities, funds) for prompt payment of claims, provided that such amount will not exceed 40% of the total annual net premium income of the Licensee.

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External Insurance Act, 2009 continued

An External Insurance Company which is a Bahamian Company is required to provide the Commission with a copy of its audited financial statements prepared by an independent auditor approved by the Commission in addition to an independent auditor's report prepared in accordance with international accounting standards or such other form as the Commission may prescribe, not more than four months after the close of the financial year of a Licensee (or such longer period as the Commission allows). A Licensee incorporated outside of The Bahamas is required to furnish the Commission with a certificate issued by the overseas regulatory authority in the country in which it is incorporated; or any other country where it is authorised and licensed to undertake insurance business, confirming that the Licensee is complying with all the applicable insurance supervisory requirements of that overseas regulatory authority within four months of the end of its financial year.

External Insurance Companies and External Insurance Intermediaries in existence prior to commencement of the Act

The EIA, 2009 provides that all External Insurance Companies carrying on business immediately prior to its coming into force shall have a twelve month period or such longer time as the Commission may designate to comply with the Act or its Regulations. Additionally, External Insurance Intermediaries carrying on the business of underwriting managers or external insurance brokers immediately prior to commencement of the Act, which intend to continue to carry on such business must make an application for licensing within one month of the date of commencement of the Act.

Part II - Benefits of Carrying on External Insurance Business in The Bahamas

Historically, offshore insurance companies have been vehicles used by large, multifaceted corporations to reduce the cost of purchasing

conventional onshore insurance through self insurance. Commentators have noted that the continuous increases in onshore commercial insurance premiums to cover the costs of the commissions, expenses and profits of onshore insurers, have led to an expansion of the market for offshore insurance to include small to medium sized enterprises.

The establishment of an External Insurance Company in The Bahamas by an onshore entity would result in a reduction of the costs associated with insuring its risks in addition to exemption from taxation, and asset protection.

Exemption from Taxation

While there are currently no taxes on income and capital under Bahamian law, if at any time in the future such taxes were to be imposed, neither an External Insurance Company licensed under the EIA, 2009 or the proceeds or avails of any policy of life insurance or annuity contract issued by such External Insurance Company would be expressly exempt from payment of any tax, duty, fee or impost in The Bahamas other than any provisions for the same in force at the commencement of, or payable in respect of a license under, the EIA, 2009 for a period of twenty years from the date of the first licence of the external insurer.

Asset Protection

The EIA, 2009 provides for the establishment of segregated accounts by an External Insurance Company conducting "variable insurance business" as defined under the Act. The assets of a client held in any such segregated or separate account will not form any part of the liability of the insurance company. Accordingly, in the event of liquidation of an External Insurance Company, licensed under the Act, the client's assets will not form a part of the general assets of the insurance company and therefore will not be available to creditors of the insurance company.



External Insurance Act, 2009 continued

...has incorporated the asset protection mechanism set out in the Fraudulent Dispositions Act, which provides the basis for offshore protection of trust assets...

The EIA, 2009 also restricts the distribution of any assets held under a policy of insurance issued on the life of the policy holder or another person, to any third party not designated in the policy and further makes the proceeds of such policy exempt from the claims of any creditor of the policyholder, or the insured, or the estate of either of them, and of any other beneficiary (or other claimant other than a beneficiary under the policy) or the estate of any beneficiary under the policy. Similar protection is granted to the holder of any annuity contract issued by a licensed External Insurance Company.

In addition, the EIA, 2009 has incorporated the asset protection mechanism set out in the Fraudulent Dispositions Act, which provides the basis for offshore protection of trust assets, by providing the specific circumstances in which an action may be pursued by a creditor of a policy holder who hopes to be paid out of the assets of

the separate account held by the licensee for the benefit of such policy holder. A creditor may make a claim to attach rights or interests in the policy only where: (i) the purchase of the policy was made with the intent to willfully defeat an obligation owed to the creditor by the policy holder; or (ii) proceedings in bankruptcy have been commenced by or against a policy holder at the date of the purchase of the policy or within 3 months of the date of the purchase of the policy. If an action or claim is not commenced within two years of the date of the relevant disposition, it is time barred by the provisions of the EIA, 2009.

The new legislation presents an update to the regulatory framework of offshore insurance business in The Bahamas that meets international standards while integrating innovative features which are unique to the jurisdiction.

CONGRATULATIONS



*Mr. Philip C. Dunkley, QC
Senior Partner*



*Mr. John K. F. Delaney, QC
Managing Partner*

*Higgs & Johnson wishes
to congratulate its partners,
Mr. Philip C. Dunkley, QC
& Mr. John K. F. Delaney, QC
on their appointment to
Her Majesty's Counsel,
the highest honor a litigator
can receive, on 23 October 2009.*

*From the Partners, Associates, Management
and Staff of Higgs & Johnson*



HIGGS & JOHNSON
Counsel & Attorneys-at-Law

DIRECTOR'S DUTIES IN A CHANGING WORLD

Directors of companies in the Cayman Islands and The Bahamas are subject to significant duties and responsibilities. This article addresses these duties and the potentially serious consequences of failing to comply.

DUTIES IMPOSED

The duties and liabilities of company directors in the Cayman Islands and The Bahamas arise under common law or are enshrined in the internal constitution of the company and the statutes of the relevant jurisdiction.

Memorandum and Articles

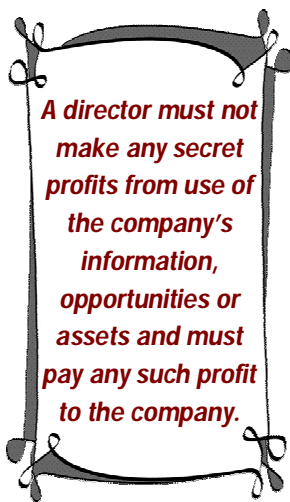
A company's memorandum and articles form the company's constitution, including provisions regarding internal management, within which its directors are bound to operate. The memorandum may restrict the company's objects and the articles will set out: (i) the extent to which directors can exercise company powers; and (ii) which powers are reserved to the shareholders. The articles and memorandum should therefore always be consulted as a starting point for an analysis of a director's duties and an indication of the scope of his powers to act.

Common Law Duties

Under common law, directors owe fiduciary duties and duties of skill and care. For example:

- A director must act in what he considers (in good faith and on reasonable grounds) to be in the best interests of the company and its current and future shareholders as a whole. The courts will typically only infer that a director has failed to perform this duty if it considers that: (i) he did not act in good faith; or (ii) no reasonable director could have believed that the course of action in question was in the best interests of the company.
- A director has a duty to exercise powers only for the purpose or purposes for which they were conferred (as set out in the memorandum and articles of association).

- A director must not act illegally or beyond the scope of the powers set out in the memorandum and articles of association. No transaction will be invalid merely on the grounds that the company has no capacity to enter into it, but a director may still be held liable for loss or damage caused by virtue of his unauthorised act.
- A director has a duty to avoid conflicts between his own personal interests and his duty to the company and must always disclose any personal interests in contracts which involve the company. The articles of a company may provide a "rule book" for compliance with this duty.
- A director must not make any secret profits from use of the company's information, opportunities or assets and must pay any such profit to the company.
- A director is required to exercise reasonable skill and care when managing the affairs of the company and can become liable in damages if he fails to do so. This duty has three aspects:
 - reasonable knowledge and skill: the relevant standard is that of a reasonably diligent person having both: (a) the knowledge, skill and experience reasonably expected of a person carrying out the functions in question; and (b) the knowledge, skill and experience that the director actually has. Though a director need not exhibit a greater degree of skill than reasonably expected from a person of his knowledge and experience, he must acquire and maintain sufficient knowledge and understanding of the business of the company. How this duty is applied will depend upon the circumstances (for example, expectations for a non-executive director may be lower than for a chief executive with a "hands on" management role);



Directors' Duties in a Changing World continued

- attention to the business: a director has a duty to attend diligently to the company's affairs. This does not bind him to give his continuous attention - he must display the reasonable diligence that an ordinary man would be expected to take, in the same circumstances, on his own behalf. Nor does it mean that errors of judgement result in breach of duty - the courts would typically only interfere if there is evidence of bad faith or if no sensible director could have reasonably reached the same decision; and

- reliance upon others: a director can delegate to other officers where it is reasonable to do so and will not be liable for the acts of co-directors or officers solely by virtue of his position. However, he is unable to absolve himself entirely of responsibility by delegating. Directors must, therefore, ensure that officers have fulfilled their obligations appropriately, by ensuring a regular flow of information from officers to directors.

Negligent Misstatement and Deceit

If a director is negligent when making a statement, he may be liable under a claim for damages made by a third party suffering loss through reliance upon that statement. A director should be cautious, for example, when asked to "sign off" on any offering or marketing document which makes specific statements of facts or opinions, which are in effect representations by the directors of the company.

Statutory Duties

Directors should appreciate that the general principles outlined above are augmented by specific duties, imposed by statute. Though provisions relating to directors can be found in

many Cayman Islands and Bahamian statutes, the primary pieces of legislation relating to their duties are (in the Cayman Islands) the Companies Law (2009 Revision) and (in The Bahamas) Chapter 308 of the Statute Law of the Bahamas. Each places specific duties relating to the management and administration of a company upon its directors, and several of these duties are sanctioned by criminal penalties (including imprisonment and/or significant fines).

WHO CAN BRING AN ACTION AGAINST A DIRECTOR?

Third Parties

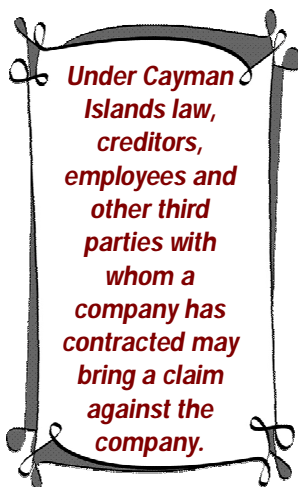
Under Cayman Islands law, creditors, employees and other third parties with whom a company has contracted may bring a claim against the company. A director can incur liabilities to a third party if he creates a personal obligation (for example, by virtue of an express representation accepting a personal obligation) or, exceptionally, if he holds himself out to have binding authority which he does not have (for example, entering into a contract when he has no authority to do so).

The Company

Where a director has not been negligent or fraudulent but complies with his fiduciary duties and acts within his authority, the fact that his decision turns out to be incorrect or causes loss to the company is unlikely to result in personal liability for the director. Where a director has been negligent, fraudulent or has breached his fiduciary duties, the company may take action against the director provided it can establish that the breach caused loss to the company. However, as the directors - not shareholders - would typically have the right to bring such an action, it is unlikely that an action would be brought if the actions in question are those of the current directors.

The Liquidator

Where a company is in liquidation, action may be



Directors' Duties in a Changing World continued

brought by the liquidator in the company's name. During the course of the winding up, if it is discovered that a director or officer of the company has been guilty of breach of duty, the court can order that director or officer to contribute such sums of money to the company as it sees fit. If criminal offences are discovered, the liquidator may apply for approval of the court to prosecute the director or officer in question.

The Shareholders

In certain, limited circumstances shareholders may take action, on behalf of the company, against directors in breach of their duties. Such actions are rare because they may only be brought with leave of the court, which will only allow an action if: (i) it is in the best interests of the company; (ii) the shareholder can establish that the directors owed personal duties to the shareholders; and (iii) the action in question cannot be ratified.

Regulatory Bodies & Foreign Prosecutors

Regulatory bodies in both jurisdictions (including, for example, the Cayman Islands Monetary Authority and The Bahamas Investment Authority) may have the power to take disciplinary action for breaches of the regulatory rules and statute.

Some foreign laws have extra-territorial scope, such as those prohibiting "Market Abuse". Furthermore, both the Cayman Islands and The Bahamas are party to a number of treaties allowing for extradition to a wide range of jurisdictions.

HOW CAN A COMPANY PROTECT ITS DIRECTORS?

As previously indicated, a court will typically only infer personal liability against a director if there is evidence of bad faith or where it considers that no sensible director could reasonably have reached the decision made. Bringing successful action against directors can, therefore, be challenging.

However, it can still pay for a company to take measures to ensure its directors are properly protected. Typical ways to increase protection for directors include the use of indemnity clauses in a company's articles of association and the purchase of civil liability insurance covering acts or omissions by directors (and officers). Where a breach of duty does occur, it may be possible for the shareholders of the company to ratify the breach in a general meeting, leaving the company itself with no standing to bring a claim against the director.

Typical ways to increase protection for directors include the use of indemnity clauses in a company's articles of association...

H&J WELCOMES NEWEST ASSOCIATES



Higgs & Johnson gladly welcomes two new Associates to the firm's offices in The Bahamas and Cayman Islands.

Pictured top left, Mr. Benjamin Wrench joins the Cayman office having over 10 years of experience in law as a practitioner. He has undertaken a wide range of legal work, while specialising in Investment Funds. After studying law at Exeter University in the UK and graduating with a LL.B. with honours in 1994, Benjamin attended the Inns of Court School of Law in London and was called to the Bar of England & Wales in 1995. He joins the firm's Securities practice group.



Pictured bottom left, Mr. Paul Davis joins the Ocean Center office in The Bahamas as a Registered Associate in the firm's Commercial Law Practice group. Additionally, he practices corporate and commercial law. Paul obtained a law degree in 2007 at the University of London, England (External Programme). In 2008, he completed the Bar Vocational Course at Northumbria University, England and was called to the Bar of England and Wales.

Higgs & Johnson Hosts Annual Client Seminar

A) (L-R) Partners,
Chris J.
Narborough,
John K. F.
Delaney, QC,
Philip S. Boni
and Dr. Earl A.
Cash



B) Partner,
Heather L.
Thompson (2nd
from right)
mingles with
clients of the firm
during the mid
morning break.



C) (L-R) Associate
Samantha
Knowles-Pratt with
Partners, Gina M.
Berry, Stephen J.
Melvin, Philip S.
Boni, Heather L.
Thompson,
Vivienne M.
Gouthro & Sterling
H. Cooke



D) Partner Michael
F. L. Allen,
moderator at the
seminar, poses
with attendees.



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HIGGS & JOHNSON hosted its annual client seminar on Tuesday 22 September 2009 under the theme 'Surviving the Present, Preparing for the Future'. Opening remarks were given by Minister of State in the Ministry of Finance, the Hon. Zhivargo Laing. He noted that, based on meetings with officials from other countries around the world, The Bahamas had fared better than some with regard to the current economic climate and he was confident that The Bahamas would emerge from this difficult season to enter a period of progress and abundance.

The first session, *Future Forecast: What Lies Ahead?*, was presented by Global Managing Partner, Mr. John K. F. Delaney, QC. It focused on the tax information exchange treaties "TIEA's" and their effect on the financial services industry. Mr. Delaney gave a detailed description of the steps that led The Bahamas to its present position as well as his ideas on the actions necessary for future progress.

Higgs & Johnson partners, Oscar N. Johnson and Tara A. A. Archer, elaborated on the various challenges faced by employees and employers and what laws are in place to govern and protect both parties.

A visiting associate from the Higgs & Johnson Cayman office, Mr. Benjamin Wrench, spoke on a director's duties including the common law responsibilities which directors owe to a company, its shareholders and creditors.

The seminar concluded with a provocative debate on whether or not the financial services industry would continue to contract unless the legal profession "opened up". Senior Partner, Mr. Philip C. Dunkley, QC along with Mr. James Smith, CFAL chairman, spoke in favor of the motion. Dr. Earl A. Cash, Higgs & Johnson partner along with Ms. Cheryl Bazard, partner at Bazard, Lamour & Co gave the opposing view. Common threads to both arguments included an increased need for continuing education and exposure for local attorneys in order to provide legal services competitive with other jurisdictions.

Higgs & Johnson, in its effort to promote *Going Green*, distributed reusable grocery bags and water bottles at the seminar sponsored by First Bahamas Title Insurance Agency and H&J Corporate Services Ltd.

F) Junior Finance Minister Zhivargo Laing delivers opening remarks at the seminar

Higgs & Johnson Hosts Annual Client Seminar

G) Partners John K. F. Delaney, QC (left) & Philip C. Dunkley, QC (right) with CFAL chairman James Smith

H) H&J clients are all smiles as they enjoy the various delightful pastries during the mid-morning break.

I) (L-R) Members of the seminar committee Claudine Stubbs, Constance McDonald, Gwen Saunders (Personal Assistants) & Antonia Burrows (Marketing & Communications Coordinator).

J) Wendy Warren, Bahamas Financial Services Board CEO listens attentively during a presentation at the seminar.

K) (L-R) Tanya McCartney, Managing Director of RBC FINCO, Cheryl Bazard, Partner of Bazard, Lamour & Co with Janyne Hodder, COB President

L) H&J Management Financial Controller, Dayan Bourne with H&J Associate Nadia J. Taylor and Eric Wilmott of Cititrust

M) H&J Partner Oscar Johnson chuckles with Julian Fountain of Butterfield Bank



DID YOU KNOW?

Did you know that generally speaking a marriage can revoke a will?

Yes, pursuant to section 13(1) of the Wills Act, 2002 (the "Act"), a will is revoked by the marriage of the person who made the will and who is called the "testator". However, notwithstanding this section, the Act provides that if it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that the testator intended for the will not to be revoked by his marriage to that person, then the will is not revoked.



Likewise, the Act states that if it appears from the will that the testator intended for a disposition or dispositions in the will not to be revoked by his marriage, those dispositions shall take effect notwithstanding the marriage. Ultimately, one would determine the intention of the testator from the words used in his will. So, if you have a will and you are about to get married, be sure that after arranging your wedding plans and your honeymoon, you arrange an appointment to see your lawyer to make a new will.