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WHAT'S INSIDE

Blockchain Investment Funds

A Cayman Perspective

Gaela Fitzgibbons

Our firm has spent the past year helping clients structure, set up and launch innovative investment fund structures specializing in investments in blockchain, Initial Coin Offering (ICO) and cryptocurrency assets. This article contains answers to some of the questions which we are frequently asked.

The Cayman Islands has a tech city which allows blockchain companies to set up a physical presence in Cayman. The tech city is a component of a special economic zone, providing companies with access to a streamlined business licensing process, inclusive of trade certificates, employee work visas, and physical office space; and is increasingly becoming home to companies developing blockchain and crypto technology. Businesses can be set up and be operating in their Cayman office in the tech city within 4-6 weeks.

The Cayman Islands is a tax-neutral jurisdiction: it has no direct taxes of any kind. There are no exchange control restrictions or regulations in the Cayman

Islands. This means that funds can be freely transferred in and out of the Cayman Islands in unlimited amounts.

There is no requirement that a company incorporated in the Cayman Islands should have a Cayman based investment manager. However, the Cayman Islands Securities & Investment Law (2015 Revision) (SIBL) provides a light-touch regulatory regime for Cayman based investment management companies that are tax-neutral and need not have employees.

The flexible legal framework in Cayman means that fund vehicles can be tailored to meet onshore tax requirements, and investor preferences, such as: the number of investors, the investment strategy, fund liquidity, fees and the frequency and nature of investor returns. This makes Cayman an attractive option.

Investments in tokens and ICOs are often illiquid and result in long exposures for investment managers. Managers looking to invest in these assets may look to Cayman for a 'closed ended fund'. This type of fund is not regulated by the Mutual Funds Law (2015 Revision) (the Law), meaning that there is less regulatory oversight and reporting.

In structuring a Cayman fund, there are a few key issues that need to be addressed in order to determine the suitable fund vehicle and its regulatory status in Cayman. In most instances, it has been assumed that the Cayman entity will be an exempted limited company or a segregated portfolio company, since these are the structures most favoured by investors in crypto assets.

Any onshore tax requirements that may determine the structure should be disclosed. Identifying the location of investors will assist with this process. The number of investors in a Cayman fund may have an impact on the choice of suitable vehicle. An exempted fund may be favoured where there are 15 or less investors, having less regulatory and reporting requirements. The nature of the fund's investment strategy may also impact the choice of fund vehicle. The frequency of subscriptions, redemptions and payments of management fees will be significant factors in determining how often a fund needs to be valued. If the fund requires a net asset value of its shares to be calculated before any of these actions can be taken, then the fund administrator will need to calculate its net asset value on each and every dealing day.

How funds will be returned to investors is an important factor to consider upfront. Will they be receiving dividends when an ICO exits, redemption funds at the end of a fixed term, or redemption funds when they choose to exit the fund? Will there be a redemption fee payable or a redemption penalty for early withdrawal (if applicable)?

If a fund intends to buy cryptocurrency itself, utilizing a digital wallet, it will need to consider whether it will place the cryptocurrency into secure cold storage locations. Some managers choose to self-custody on their own hard drives. Where an auditor is appointed, it will want to know the fund's custody position, and what back up measures, internal controls and security measures are in place to protect encryption keys.

Key documentation should be identified upfront. The fund's incorporation documents will be required by most service providers before formal instruction. Written agreements will need to be in place with all service providers, as well as letters of consent from auditors and administrators prior to any Cayman Islands Monetary Authority (CIMA) registration application. In most cases, an offering document, accompanied by subscription documentation and due diligence, will also need to be prepared. Most institutional banks will want to see all of these documents before opening accounts in the name of the fund.

Funds that provide no redemption or repurchase rights to investors (i.e. closed -ended funds) are not regulated mutual funds in the Cayman Islands. Many ICO issuers issuing coins or tokens will not be mutual funds on the basis that their tokens do not carry redemption rights.

Most investment funds that fall within the definition of a mutual fund do not need to be licensed with CIMA, but they do need to register with CIMA as a section 4(3) mutual fund.

Section 4(3) mutual funds have ongoing compliance obligations with CIMA, including the payment of annual fees to CIMA and the submission of audited financial statements (signed by a local auditor).

Section 4(3) mutual funds must keep a copy of the current and up-to-date offering document on file with CIMA. The offering document must contain disclosures that describe the equity interests in all material respects, as well as such other information as is necessary to enable a prospective investor in the mutual fund to make an informed decision as to whether or not to subscribe for or purchase the equity interests. This means that funds investing in crypto assets must make extensive disclosures to investors about the risks inherent with such investments. Service providers will want a hand in the drafting of these disclosures as they pertain to the services that they provide.

SIBL regulates those Cayman entities (only) who carry on or purport to carry on securities investment business. Managing an investment fund with crypto assets, generally classifies as securities investment business. The definition of securities in the law includes coins and tokens. However, in most cases Cayman-based investment managers are

classified as 'excluded persons' under the law on the basis that they provide investment advice to sophisticated investors.

All Cayman investment funds must comply with the Anti-Money Laundering (AML) Regulations (2017 Revision), which require the fund to obtain customer due diligence information, including source of funds and identification of beneficial owners, in respect of both the initial purchaser of the interests and subsequent transferees. All Cayman funds must also appoint a natural person to act as the AML compliance officer (AMLCO), the money laundering reporting officer (MLRO) and the deputy MLRO (DMLRO).

The Cayman Islands has adopted regimes that provide for: (a) the automatic exchange of information for tax purposes; and (b) the establishment of a platform on which beneficial ownership information of "in-scope" companies must be maintained (this is unlikely to include the identities of ICO token holders) and comply with all relevant requirements on an initial and ongoing basis. All Cayman funds need to ensure compliance with all relevant requirements of these regimes.

Cryptocurrencies are relatively new and the regulation of crypto assets and blockchain technologies is a rapidly evolving area of law globally. In this context, the Cayman Islands is leading the way in enacting a flexible regulatory framework to respond to market demands.

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Aviation Partner Leads Session at CARIBAVIA

Michael F. L. Allen, partner, was one of two break-out group moderators at CARIBAVIA: The Caribbean Aviation Meet -up held on 12-14 June at Atlantis, Paradise Island. Mr. Allen is the chairman of the firm's aviation practice group and also chairs The Bahamas Air Transport Advisory Board which advises the Minister of Tourism and Aviation on matters connected with the granting of air transport licences. Leading the session on aircraft registration, Mr. Allen said, "The Bahamas is poised to enter a new and exciting phase in the development of its aviation sector as it begins to consider enhancements to its aircraft registry." His presentation placed particular emphasis on a review of the best of the best offshore jurisdictions for the registration of aircraft. Participants were taken through an overview of reputable, profitable and innovative aircraft registries.

Mr. Allen also led an analysis of the strengths of The Bahamas as a jurisdiction seeking to capitalize on the experience of regional competitors who have successfully launched and are maintaining first class aircraft registry services. "The Bahamas has all the fundamentals to be a leading jurisdiction in providing aircraft registry services," he said. "We already have a reputation for providing high quality financial services, a service orientated and personable work force and notable experience with operating a world class ship registry."

He noted indications of the Minister of Aviation's commitment to the creation of a designated registry for registering interests in aircraft, and anticipated that the jurisdiction will also give attention to issues relative to the ratification of the Cape Town Convention, which concerns the recognition of international interests in mobile equipment and matters specific to aircraft equipment.

The Opportunity of a Lifetime

The Bahamas as a Centre for International Commercial Arbitration

Theominique Nottage

In the late 2010s, the Government of The Bahamas enacted The Arbitration Act, 2009 as "an act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for other matters related thereto".

The Arbitration Act, 2009 along with the Arbitration (Foreign Arbitral Awards) Act, 2009 which incorporated the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (the ***New York Convention***), replaced the 19th century arbitration legislation that The Bahamas inherited from England and was a major step toward an improved legislative framework to support international commercial arbitration in The Bahamas.

Essentially, arbitration is a method of alternative dispute resolution. Some of its benefits include – (i) greater privacy and confidentiality, (ii) speedier process, (iii) neutrality, (iv) greater party autonomy, and (v) finality of decisions. These benefits offer the parties more than would the typical court proceedings.

Specifically, international commercial arbitration, according to Lew, Mistelis and Kroll, "…is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties."

Accordingly, due to its growth in popularity over the last several decades, arbitration has become the preferred method of dispute resolution for multinational enterprises and the like. Centres for international commercial arbitration like Singapore, Hong Kong and London continue to witness the proliferation of international commercial arbitration. This is due in large part to the incorporation of the United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 and the UNCITRAL Arbitration Rules (as revised in 2010) (the ***UNCITRAL Model Law***) into its domestic legislation.

The UNCITRAL Model Law is important as it sets the standard for the harmonisation of international commercial arbitration legislation across both common law and civil law jurisdictions. It is a well established fact that for arbitration to exist and succeed, there must be a regulatory framework which controls the legal status and effectiveness of arbitration in a national and international legal environment.

In the near decade since the last revision of The Bahamas' arbitration legislation, successive government administrations have continued to work toward improving our legislative framework. In January 2018, the Minister of Financial Services (who has governmental responsibility for international commercial arbitration) indicated that "… the government remains committed to the establishment of the country as a modern and sophisticated international arbitration centre."

Moreover, as recently as March 2018, the Minister stated that the forthcoming International Commercial Arbitration Bill 2018, will facilitate international

commercial arbitration in The Bahamas and will incorporate the UNCITRAL Model Law. Through the incorporation of the UNCITRAL Model Law, The Bahamas will position itself to become a preferred centre for international commercial arbitration and open itself to opportunities to generate new business and facilitate additional foreign investment.

Independent of the upcoming incorporation of the UNCITRAL Model Law, The Bahamas already has the beginnings of a prime jurisdiction for international commercial arbitration as it has already incorporated the New York Convention, often described as 'the cornerstone of the international arbitration system', which allows for the cross-border enforcement of arbitral awards. In addition to its legislative framework, The Bahamas also has a sophisticated judiciary, high quality legal community, a strong financial services reputation and the commitment of the Bahamian government to advance The Bahamas as a centre for international commercial arbitration.

With its strategic location as the crossroads to the Americas, The Bahamas is well-positioned to become a favoured jurisdiction for international commercial arbitration. The Bahamas offers a developed financial services sector in addition to a large ship registry that could lead to the development of maritime arbitration. Moreover, due to existing supporting legislation like the Trustee (Amendment) Act, 2011, other specialty areas of arbitration may be developed. For The Bahamas, it is the opportunity of a lifetime.

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The Litigator's Toolbox - Without Prejudice

Philip S. Boni

In this article I shall take from the Litigators Toolbox the term "without prejudice," which is often employed inappropriately .

The without prejudice rule provides an umbrella under which persons involved in a dispute can negotiate without fear of their communications being revealed to the Court. As such, disputants can make admissions or offers to settle without being bound by them if their talks fail to reach a settlement. The policy behind the rule was described in **Cutts v. Head (**[1984] Ch 290) where Oliver L.J. said that parties should be "*encouraged fully and frankly to put their cards on the table*". This should be done by "*preventing statements or offers*" being brought before "*the Court as admissions on the question of liability and / or quantum."*

The influence of public policy on encouraging persons to settle their disputes without resorting to litigation, is an important factor in the without prejudice rule as is the contractual element of the Rule.

The objective is therefore, to allow disputants to negotiate their disputes in an atmosphere of trust. The implied contract aspect of the rule is the parties' agreement not to disclose admissions or other matters arising during the negotiations, to the Court. Communications between parties which are "without prejudice," are generally inadmissible as evidence in court and cannot be made the subject of a disclosure order in any proceedings.

The support for litigants being able to properly engage in settlement negotiations was illustrated by the case of **Suh v Mace (UK) Ltd**. (SUH v Mace (UK) Ltd [2016] EWCA C. V4.) The Plaintiffs were commercial tenants who sued the landlords for unlawful

forfeiture. An issue arose regarding the admissibility of two communications between the Plaintiffs and the Defendant landlord's solicitor (Ms. Jackson). The Defendant sought to adduce notes of meetings in evidence because they contained admissions by Mrs. Suh that there was unpaid rent. The landlord succeeded at first instance, however, the Court of Appeal took a different view. The Court of Appeal held that "*the only sensible purpose for such a meeting must have been to seek some kind of solution to the litigation. That is what a settlement is.*" Because Mrs. Suh had been ignorant of any potential privilege, and hence could not have acted to positively or negatively affect the privilege, her appeal was allowed. Vos LJ declared all privileged communications inadmissible. This decision could be simply explained and understood in the context of the public policy aspect of the umbrella, namely to reduce costs and legal time by permitting parties to properly engage in negotiations without fear of any admissions being disclosed to the court.

For a document to be inadmissible on the ground that it is without prejudice, it must form part of a genuine attempt to resolve a dispute. There are two elements which need to be apparent, namely: (1) a genuine dispute to be resolved and (2) a genuine attempt to resolve it.

Once a party has made a without prejudice offer, the privilege will attach not only to the offer, but to the response; whether or not it includes a counter offer, whether it is a mere request for information, whether it is simply an outright rejection without any further attempt to settle.

It is not all plain sailing. As with every rule of law, the Without Prejudice Rule has its exceptions. The case of **Ofulue (**Ofulue v. Bossert [2009] 3 All ER 93.) is one in which communications were rendered admissible in evidence. In that case, Lord Hope stated that: "*the court should be slow to lift the umbrella (of the without prejudice protection) unless the case for doing so is absolutely plain".* In the same case Lord Walker stated "*As a matter of principle I would not restrict the without prejudice rule unless justice clearly demands it*".

Any commentary on the without prejudice rule would not be complete without mentioning the role which costs play both in litigation and also in negotiations. In the case of **Walker** (Walker v. Wilsher [1889] 23 QBD 335 (CA)), the Court of Appeal held that without prejudice communications could not form part of the court's costs considerations. However, the Court of Appeal suggested it would be permissible in a case which changed this situation and gave rise to the well-known "Calderbank offer". In **Calderbank** (Calderbank v. Calderbank [1976] FAM 93 (CA)), it became permissible for a party to reserve the question of costs in a without prejudice offer. From this, the practice of writing "without prejudice save as to costs" arose such that negotiations which have taken place expressly on a without prejudice save as to costs basis, are admissible on the question of costs as an exception to the general rule which precludes the admission of without prejudice. As a result, Calderbank offers can be a useful tool to settle a dispute and can sometimes provide a more suitable alternative to other methods of dispute resolution.

When entering into negotiations to settle a dispute, the without prejudice umbrella is an extremely useful aid, but must be employed carefully, otherwise the documents or other materials may lose the protection of the rule and become admissible in court.

There will doubtless be further development of the without prejudice rule and refinements in future cases. As matters stand, when properly deployed, the rule is a useful tool to facilitate negotiations and obviate recourse to protracted litigation.

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H&J News

Partner chairs session at IBA Litigation Forum

Tara Archer-Glasgow, Litigation Partner, chaired the session - Advocacy in the 21st Century: Challenges and Opportunities - at the annual IBA Litigation forum held in Chicago. Senior Associate, Audley D. Hanna, Jr. was also in attendance and the firm was one of the sponsors of the event.

Partner provides Bahamas update at INSOL

Insolvency & Restructuring partner and INSOL Fellow, Tara Cooper Burnside presented at the Annual Regional Conference of the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL International) in New York. Tara's session, "Offshore Restructuring – What's Happening And What's Interesting!" involved a panel discussion of recent developments in offshore insolvency and restructuring. In addition to The Bahamas, there were updates from the Cayman Islands, Singapore, Bermuda, BVI, Guernsey and Hong Kong.

Attorney presents at STEP Caribbean conference

Private Client & Wealth Management attorney, Theo Burrows, lead attendees in the interactive session – *Trust Drafting: Do's and Don't's* – at the annual STEP Caribbean Conference – *Fast Forward: Future Thinking* – hosted by STEP Barbados. Theo reviewed some significant issues which commonly arise during trust drafting, and identified various trust drafting techniques. He also guided delegates through some of the traps for the unwary which arise in the drafting context.

Board of Directors Appointment

Partner, Christel Sands-Feaste has been re-elected to the Board of Directors of the Bahamas Chamber of Commerce and Employers Confederation (BCCEC). She also chairs the BCCEC's Ease of Doing Business committee.

STEP Caribbean Conference

Senior Associate and a director of STEP Bahamas, Sharmon Ingraham attended the STEP Caribbean conference and is pictured above with Vice-Chairman of STEP Bahamas Joann Pyfrom.