

The Bahamian International Cooperation Regime for Criminal Matters

The Bahamian legal system is modeled on the common law system inherited from the United Kingdom. In that regard in order for its Courts to give effect to a Treaty signed by the Government of The Bahamas, the Courts must have evidence that the provisions of the treaty are reflected in domestic legislation.

The Bahamas is a Party to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Criminal Justice (International Co-operation) Act 2000 (No. 42 of 2000), enables The Bahamas to implement some of the provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as it applies to offences at sea on Bahamian registered ships or ships registered in Convention States.

The Mutual Legal Assistance in Criminal Matters Treaty signed by the Governments of The Bahamas and the United States of America on 12th June 1987 and 8th August 1987 respectively, is given domestic effect by the Mutual Legal Assistance (Criminal Matters) Act 1988 (No.2 of 1988). The said legislation came into force on 20th August 1990. The Mutual Legal Assistance Treaty signed with Canada on the 13th March, 1990 is given domestic effect by the Mutual Legal Assistance Criminal Matters Act, 1988 (Amendment of Schedule) Order, 1990 (S.I. No. 54 of 1990). Under both Treaties the Attorney General of The Commonwealth of The Bahamas is the Central Authority to whom requests for assistance should be addressed.

In the absence of a Treaty and its relevant domestic enabling legislation, a foreign Court, tribunal or authority seeking evidence or the disclosure of information in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, must apply to the Attorney General for assistance pursuant to the provisions of the Criminal Justice (International Co-operation) Act, 2000 (No.42 of 2000).

If the Attorney General is satisfied that an offence under the law of the country has been committed or that there are reasonable grounds for suspecting that such an offence has been committed and that proceedings in respect of that offence have been instituted in that country or that an investigation into that offence is being carried on there, the Attorney General may, after consultation with the Chief Justice, by written notice nominate a court in The Bahamas to receive the evidence to which the request relates. Where it appears to the Attorney General that the request relates exclusively to a fiscal offence, he shall not exercise his powers unless the request is made pursuant to a tax information exchange treaty to which The Bahamas is a party.

Request for evidence or information, which is not within the public domain, are subject to a court application. Such applications are made by the attorneys within the Office of the Attorney General. In order to proceed with a court application, the request must be accompanied by:

Official English translations where relevant

A brief factual outline of the case and the offences/charges involved, as a synopsis of the case will have to be included in the Court documents which have to be prepared for the court application;

Certified copies of any and all documents referred to in the letter of request as they are exhibited to the request.

An indication from the requesting court, tribunal or authority whether the evidence to be transmitted is to be accompanied by a certificate, affidavit or other verifying documents.

In those instances where a foreign court, tribunal or authority is requesting bank documents or that bank officials be questioned relative to bank accounts and bank customers, the request must clearly show:

The name of the bank and/or the bank account number;

Any evidence that the person(s) opened or caused the account(s) to be opened or exercised control over the account(s);

A list of relevant questions to be posted to the bank official.

Sometimes the request may include a request that certain individuals from the requesting state be present during the examination of a witness. Foreign judicial officers and foreign attorneys have no right of appearance before the Bahamian Court. Should such persons wish to attend the examination of a witness, permission must be sought from the Court. This information must be included in documents which are to be presented to the Court.

The court documents which must be prepared to commence the court application are an Ex Parte Summons which is accompanied by an Ex Parte Affidavit. These documents are filed in the Registry of the Supreme Court. The filing of the Ex Parte Summons and Ex Parte Affidavit and the subsequent assigning of an action number by the Supreme Court Registry officially commences the action in the Court system. When the Ex Parte Summons and Ex Parte Affidavit have been filed in the Supreme Court Registry, a date is obtained in order to have the application heard by a Judge of the Supreme Court. Such applications are heard by Judges in Chambers as opposed to open court.

Attorneys from the Office of the Attorney General make all formal submissions relative to the application and the request. Once the Judge hears the application and accedes to it, a Court Order is made relative to the application. The Court Order must be perfected or signed by the Judge. It is then filed in the Supreme Court Registry and served on the relevant parties.

If the request requires the questioning of a witness and that the witness should produce certain documents at his/her examination, a date must be obtained for an Examiner or some other appropriate Officer authorized by the Court to proceed with the questioning of the witness. Once a date has been obtained, then the Court Order compelling the witness to appear to answer the question on oath, together with a Notice of Trial advising of the date of questioning must be served on the witness.

If during the examination of a witness an official from the requesting state is present and requires additional questions arising from any answers given in evidence by the witness, those questions must be posed through the legal officer from the Office of the Attorney General who must seek the permission of the Examiner for the question(s) to be put to the witness. The actual question is put to the witness by the Examiner. Any evidence given during the hearing before the Examiner is taken down by a Court stenographer. Sometimes a witness may have his/her attorney present to protect his/her interest. That attorney is also allowed to request the Court's permission for any additional questions which may arise on examination of the witness. Under the Criminal Justice (International Co-operation) Act, 2000, a witness may claim privilege in certain circumstances defined in the Act. A new amendment to the Rules of the Supreme Court provides for the procedure which should be followed if a witness claims privilege.

After the questioning of the witness the Examiner then prepares the evidence taken in the appropriate form for eventual transmission to the requesting Court, tribunal or authority.

The above procedure presupposes that the application for obtaining the evidence is not challenged. If it is, then this may involve additional applications and Chambers hearings before a Supreme Court Judge. The evidence received by the Court pursuant to a request is sent to the Attorney General for transmission to the court, tribunal or authority which made the request.

In addition to the foregoing the establishment of the Financial Intelligence Unit under the provisions of the Financial Intelligence Unit Act (No. 39 of 2000) now means that the Financial Intelligence Unit is responsible for receiving, analyzing, obtaining and disseminating information which relates to or may

relate to the proceeds of crime under the provisions of the Proceeds of Crime Act, 2000 (No. 44 of 2000) namely offences under the Prevention of Bribery Act, drug trafficking offences, money laundering offences, offences which may be tried on information other than drug trafficking offences and offences committed anywhere that if they occurred in The Bahamas would constitute offences in The Bahamas. The Act provides the principal legal mechanism for international cooperation with other foreign Financial Intelligence Units and law enforcement authorities. Pursuant to the Financial Intelligence Unit Act, the Unit may now provide information relating to the commission of an offence specified in the Proceeds of Crime Act, 2000 to any Foreign Financial Intelligence Unit, subject to any conditions as may be considered appropriate by the Director of the Financial Intelligence Unit of The Bahamas. Under the Act, the Unit is given power to enter into any agreement or arrangement, in writing, with a Foreign Financial Intelligence Unit which the Director considers necessary or desirable for the discharge or performance of the functions of the Financial Intelligence Unit.

In addition, upon receipt of a request from a Foreign Financial Intelligence Unit, the Unit may, without having to first obtain a Court order, order any person to refrain from completing any transaction for a seventy-two hour period. Additionally, upon receipt of a request from a Foreign Financial Intelligence Unit or law enforcement authority, the Unit may order any person to freeze a person's bank account for a period not exceeding five days, if satisfied that the request relates to the proceeds of an offence specified in the Proceeds of Crime Act, 2000. If the Unit is acting under this provision, an aggrieved person may apply to a Judge in Chambers to discharge the asset freezing order. However, such an application does not suspend the freezing order pending the determination by the Court. The Unit also has the power to require the production of information, excluding information subject to legal professional privilege that the Unit considers relevant to fulfill its function.

The Financial Intelligence Unit is also responsible for the receipt and analysis of suspicious transaction reports required to be made under the provisions of the new Financial Transactions Reporting Act, 2000 (No.40 of 2000). Under the Financial Transactions Reporting Act, 2000 financial institutions within The Bahamas are now required under penalty of law to verify the identification of customers and to report suspicious transactions which they know, suspect or have reasonable grounds to suspect involves proceeds of criminal conduct as defined in the Proceeds of Crime Act, 2000, or any offence under the Proceeds of Crime Act, 2000, or an attempt to avoid the enforcement of any provision of the Proceeds of Crime Act to the Financial Intelligence Unit. For purposes of the Financial Transactions Reporting Act, a `financial institution is broadly defined as a bank or trust company licensed under the Banks and Trust Companies Regulation Act, 2000; a company carrying on life assurance business as defined in the Insurance Act; a co-operative society registered under the Co-operative Societies Act; a friendly society enrolled under the Friendly Societies Act; a licensed casino operator within the meaning of the Lotteries and Gaming Act; a broker-dealer within the meaning of the Securities Industry Act; a real estate broker for the purpose of settling real estate transactions; a trustee or administration manager or investment manager of a superannuation scheme; a mutual fund administrator or operator within the meaning of

the Mutual Funds act; any person whose business or a principal part of whose business consists of borrowing or lending or investing money, administering or managing funds on behalf of other persons, acting as trustee in respect of funds of other persons, dealing in life assurance policies, providing financial services that involve the transfer or exchange of funds; counsel and attorney for the purpose of deposit or investment, settling real estate transactions or for holding in a client's account; an accountant who receives funds for the purpose of deposit or investment.

Should the analysis of any suspicious transaction report or other information by the Financial Intelligence Unit lead to a decision that an investigation should take place, that information is passed on to the Money Laundering and Asset Forfeiture Section of the Drug Enforcement Unit of the Royal Bahamas Police Force. That section is responsible for the investigation of suspected cases of money laundering and other matters, which may lead to asset forfeiture.

The Financial Intelligence Unit (Designation of Foreign Financial Intelligence Units) Order 2001 when enacted would designate all the Foreign Financial Units that are a part of the Egmont Group.

The Proceeds of Crime Act, 2000 makes provisions for the search, seizure and confiscating of the proceeds of crime and the registration of foreign confiscation orders. The Proceeds of Crime (Designated Countries and Territories) Order 2001 (S.I. No 6 of 2001) provides a system for the registration of external confiscation orders by modifying the Proceeds of Crime Act for the purposes of external confiscation orders only. The modified Act which is set out in the Third Schedule defines an external confiscation order as an order of a court in a Designated Country or Territory made for the purpose of recovering property gained as a result of drug trafficking or any other relevant offence, or depriving a person of a pecuniary advantage similarly gained. The enforcement of an external confiscation order may be facilitated by any of the Orders available to a Bahamian Court under the Proceeds of Crime Act, 2000 for domestic purposes. In addition, property recovered under an external confiscation order is paid to the Court to be applied towards satisfaction of the external confiscation order.

The Proceeds of Crime (Designated Countries and Territories) Order 2001, sets out a list of Designated Countries and Territories from which external confiscation orders may be registered and enforced in The Bahamas. As a result of The Proceeds of Crime (Designated Countries and Territories) Order 2001 confiscation orders made in any designated country can be registered in The Bahamas as an external confiscation order and any property owned by the person against whom the confiscation order is made may be confiscated in The Bahamas if the Court accedes to the order. The Order sets out the procedural steps which must be taken in the various Designated Countries and Territories in order for proceedings to have been commenced in accordance with the Proceeds of Crime Act, 2000. Property potentially the

subject of an external confiscation order may be restrained pending the completion of criminal proceedings in the designated country. In addition the Order sets out in relation to each Designated Country and Territory the authority therein competent to issue a registrable and enforceable external confiscation order. Where the order does not specify an appropriate authority for a Designated Country or Territory, the Attorney General of The Bahamas may supply the Bahamian Court with a certificate stating that the issuing authority of the external confiscation order is the appropriate one.

The Order provides that any judgment or order purporting to bear the seal of a court in a Designated Country or Territory or to have been signed by a judge or magistrate of a Designated Country or Territory will be deemed without further proof to be the signed or sealed document which it purports to be. Certified copies of these documents are treated in the same manner.

Certificates from Designated Countries and Territories purporting to have been issued by the appropriate authority and stating that proceedings have been or are to be commenced there; the Defendant has been notified of the proceedings or contemplated proceedings; sums remain payable under the external confiscation order, which is in force and not subject to appeal; any other person affected has been notified; and an order has been or will be made, which will have the purpose of recovering payments or other rewards, shall be accepted as being what they purport to be, and the statements contained therein will be taken as evidence of their truth.