

Botswana

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Introduction

Geography

The Republic of Botswana is located in southern Africa, sharing borders with Namibia to the west, South Africa to the south, and Zambia and Zimbabwe to the north. Botswana is a landlocked state and is the second southern-most country on the African continent. Botswana covers a total geographic area of 581,730 km and is approximately the same size as France and the American State of Texas.

Botswana is a predominately flat territory, with approximately 70 per cent of the country's land mass covered by the Kalahari Desert, which is most prominent along the western parts of the country. Botswana enjoys a semi-arid climate marked by hot summers and warm winters. Botswana is home to the 1,000th UNESCO World Heritage Site, the Okavango Delta, which is one of the world's major inland deltas.

Language

The official language in Botswana is English, while Setswana is the national language. English is the language of government and the courts and is widely spoken across the entire country. Several other languages, such as Kalanga, Shekgalagadi, Sembukushu, and Sesarwa, are spoken in some parts of the country.

Population and Cultural Composition

Despite being the 49th largest country in the world, Botswana is a sparsely populated country with a total population of 2,214,858. The majority of the country's population is concentrated around the eastern territory, particularly in and around the capital city, Gaborone. Fifty-eight per cent of the population lives in urban areas and the *de facto* population is expected to grow by approximately 1.5 per cent in 2017. Thirty-eight per cent of the population is between the ages of 25 to 54 years.

The people of Botswana are referred to as *Batswana* in the plural and as *Motswana* in the singular. The population is made up of 79 per cent of ethnic Setswana-speaking people, 11 per cent ethnic Kalanga-speaking people, and three per cent ethnic Basarwa people, while the remaining seven per cent is made up of other

minority ethnic groups such as Hambukushu, Caucasian, and Asian. Seventy-nine per cent of the Botswana population are identified as Christian, 15 per cent as non-religious, three per cent as traditional African religious, and 1.4 per cent as other (Islam, Hindu, Baha'i, Sikh, Rastafarian, and Jewish).¹

Political System

Botswana is a multiparty constitutional democracy. Elections at national and local level are held every five years. The government and political system of Botswana are some of the most stable in the world; free and fair elections have been held since 1996; and Botswana is consistently rated as one of the least corrupt countries in the world.

There are three branches of government: the Executive, which is tasked with administering the country; the Legislature, which is tasked with making, amending, and/or repealing the laws of the country; and the Judiciary, which is tasked with interpreting the laws. The President of Botswana is the leader of the Executive Cabinet, which includes, amongst others, the following:

- Ministry of Investment, Trade and Industry, which is responsible for attracting and regulating domestic and foreign investment in the industrial and commercial sectors;
- Ministry of Nationality, Immigration and Gender Affairs, which is responsible for the granting of immigration documentation;
- Ministry of Transport and Communication, which is responsible for infrastructure development and maintenance in the transport and ICT sectors;
- Ministry of Mineral Resources, Green Technology and Energy Security, which is responsible for the regulation of the mining and energy sectors; and
- Ministry of Employment, Labor Productivity and Skills Development, which is responsible for the granting of work permits.

Macroeconomic Overview

Compared to its peers in Africa, Botswana has an established record of political and macroeconomic stability, with a well-developed mining sector and a sound regulatory environment. Government maintains a prudent economic policy and aims to present Botswana as a foreign-investor-friendly country.

Economic growth is set to accelerate over the coming quarters in Botswana as the country's key mining sector recovers from a recent slowdown. The economy experienced a growth rate of 4.3 per cent in 2016 after contracting by 1.7 per cent in 2015.² Real GDP growth is forecast to increase by 5.3 per cent in 2018, from a projected 4.7 per cent in 2017. The value of Botswana's Pula (BWP) is

1 CIA Factbook, *see* <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html>.

2 BMI Date Tool; 2018/19 Budget Speech of the Republic of Botswana.

determined by a basket of currencies through a crawling-peg mechanism that makes small adjustments based on expected inflation differentials with trading partners. In January 2017, the current basket weights were adjusted to 45 per cent for the South African rand and 55 per cent for the International Monetary Fund's special drawing rights (SDR). In addition to the revised currency basket weightings, the central bank has reduced the upward rate of crawl from 0.38 per cent to 0.26 per cent, effectively slowing the currency's pace of appreciation against the peg to the SDR.

Legal System

Botswana has a robust legal system and enjoys a transparent and well-administered court system. The Common Law is Roman-Dutch law and comprises of the general laws as received by the country from the Cape Colony during the protectorate era.

As a result, Botswana courts will look to decisions of the South African courts for precedent on a persuasive and non-binding basis. In addition to the Common Law, a parallel system of customary law is extant and refers to the indigenous systems of laws. Customary courts operate in parallel to the Common Law courts and deal primarily with issues of estates and family law.

Establishment of Enterprises

Forms of Enterprises

While the Common Law has its basis in Roman-Dutch law, the laws relating to enterprises, akin to our South African neighbors, have their roots in the forms of commercial entities that were established in English law. It follows that an entity can carry on business in Botswana as a sole proprietorship, a limited-liability company, and a partnership.

Sole Proprietorship

A sole proprietorship refers to a business that has no existence distinct from that of its owner, being a person who runs a commercial enterprise for their own account. There is no statutory regulation of sole proprietorships in Botswana and, in terms of the Common Law, a sole proprietorship does not create a separate legal identity. A sole proprietorship has unlimited liability.

It is common for sole proprietors to trade under a business name, which business name may be registered with the Companies and Intellectual Property Authority (CIPA) and in terms of the Registration of Business Names Act.³ CIPA must lodge and register a business name registration at a fee of BWP 170. The timeframe applicable to the registration of a business name is approximately 15 to 30 business days, dependent upon the sufficiency of documentation submitted and the backlog faced by CIPA.

³ Registration of Business Names Act, chapter 42:05.

Limited-Liability Company

The formation and operation of companies in Botswana are governed by the Companies Act,⁴ as well as the attendant Companies Regulations. In terms of the Companies Act, a company will be a company limited by shares, a close company, or a company limited by guarantee.⁵ A company may either be private or public.

A private company is a company that cannot have more than 25 shareholders and cannot make an offer to the public to subscribe for its shares.⁶ A public company is a company that has no limit on the number of shareholders and that can make an offer to the public to subscribe for its shares. The most common type of company in Botswana is the private limited company.

Every company limited by shares or by guarantee must be a public company unless it is stated in its constitution or in its application for incorporation that it is to be a private company. A private company must have at least one director who is ordinarily resident in Botswana, while a public company must have at least two directors one of whom is ordinarily resident in Botswana.⁷

The formation of a company involves its incorporation with CIPA. The incorporation process starts with the filing of a name reservation, where a prospective company submits three proposed company names to CIPA for the reservation of a name. A name reservation will be valid for 30 days. Following the successful reservation of a name, the company thereafter applies for incorporation under the reserved name. The applicant will be required to submit documents detailing the full names, physical address, residential address, email, and contact numbers of the persons to be appointed as shareholders, directors, and company secretary.⁸

The applicant must also submit a declaration of compliance signed by a legal practitioner, member of the Botswana Institute of Accountants, member of the Southern African Institute of Chartered Secretaries and Administrators, or such other class of persons as the Minister may prescribe who was engaged in the formation of the company and will state that the application for incorporation complies with the provisions of the Companies Act.⁹

Upon receipt of a properly completed application for incorporation, CIPA will assign the applicant a unique company number and issue with it a certificate of incorporation.¹⁰ A certificate of incorporation will be conclusive evidence that a company is incorporated in accordance with the provisions of the Companies

4 Companies Act, chapter 42:01.

5 Companies Act, section 19.

6 Companies Act, section 245.

7 Companies Act, section 145.

8 Companies Act, section 21(2).

9 Companies Act, section 21(3).

10 Companies Act, section 22.

Act.¹¹ Once a certificate of incorporation has been issued, a private company may commence business operations.

The timeframe applicable to the incorporation of a company with CIPA is approximately 15 to 30 business days, dependent upon the sufficiency of documentation submitted and the backlog faced by CIPA. CIPA will lodge and register a company incorporation at a fee of BWP 360.

External Company

The Companies Act also provides that a foreign company incorporated outside of Botswana may establish a corporate presence in Botswana through registration as an external company (commonly known as a “branch office”). Registration as an external company does not result in the creation of a separate legal personality; rather, registration as an external company will result in a foreign-based company being recognized, and being made subject to, the Companies Act.

In terms of the Companies Act, every external company must, within one month of establishing a place of business or commencing business in Botswana, lodge with CIPA a duly authenticated copy of the certificate of incorporation or registration in its place of origin or a document of similar effect; a duly authenticated copy of its constitution, charter, or statute or memorandum, and articles or other instrument constituting or defining its constitution; a list of its directors containing details of their postal and residential addresses, certified copies of their passports, and telephone numbers; where the list includes directors resident in Botswana who are members of the local board of directors of the company, a memorandum duly executed by or on behalf of the external company stating the powers of the local directors; the name and address of a person in Botswana who is appointed by the external company to have responsibility for the management of the business of the external company in Botswana; and the address and location of the registered office of the external company in Botswana.¹² Upon receipt of the necessary documents, CIPA will register the company and issue a certificate of registration.

The timeframe applicable to the registration of an external company with CIPA is approximately 15 to 30 business days, dependent upon the sufficiency of documentation submitted and the backlog faced by CIPA. CIPA will lodge and register a company incorporation at a fee of BWP 4600.

Partnership

A partnership refers to an association of two or more persons who agree to contribute money, labor and skill with a common purpose to carry on business with the object of making a profit for their joint benefit.¹³ A partnership does not

11 Companies Act, section 23.

12 Companies Act, section 345.

13 Kiggundu, *Company and Partnership Law in Botswana* (2nd ed, 2015), at p. 252.

create a separate legal identity and therefore it does not have a legal personality independent from the partners themselves.

There are no statutory provisions that govern the formation and operation of partnerships in Botswana. Partnerships are governed by Common Law and the provisions of the underlying partnership agreement. As of the date hereof, legislation has not provided for limited partnerships or for incorporation of professional partnerships, which lacunae practitioners hope will be rectified in the future.

Acquisition of Enterprises

The laws of Botswana generally recognize the right of parties to acquire and/or invest and/or dispose of their ownership in enterprises. Persons doing business in Botswana enjoy broad freedom of contract and may structure any transaction in a method which best suits their needs. In keeping with the Common Law world, an enterprise may be acquired either by the acquisition of control of the target enterprise's assets or by the acquisition of control of the issued shares of the target enterprise.

There are no statutory limitations on foreign direct foreign investment (subject to what is set out below in respect of certain restricted trades). In terms of the Competition Act,¹⁴ a proposed acquisition may be subject to merger control and approval by the Competition Authority, which is the regulating authority for competition law and policy, if the proposed transaction meets statutory thresholds for merger control.¹⁵

In terms of the trade licensing laws of Botswana, certain industries and businesses, primarily in the sector of small to medium size enterprises, have been reserved solely for citizens of Botswana or wholly-owned citizen companies. For example, trading licences to operate fuel stations, bottle stores, salons, general dealers, and butcheries are reserved solely for citizens or wholly-owned citizen companies. It follows that foreign investors shy away from investment in such businesses as they will be unable to be licensed to trade.

Acquisition of Realty

In General

Botswana has a unique system of land tenure comprising three different forms, being freehold, deeds of fixed-period state grant, and tribal leases. Freehold title in Botswana will be familiar to Common Law lawyers and endows the holder of such title with ownership *in toto* of such land. Deeds of fixed-period state grant is a form of lease in which the state grants an interest in the land for an extended

14 Competition Act, chapter 46:09.

15 Competition Act, section 54, as read with Regulation 20 of the Competition Regulations.

period of time (usually 50 years) but retains a reversionary right to such land at the expiry of the term. Tribal land is communal land held by the eight main clans of Botswana and is granted in the form of a lease to lessees on a long lease.

Subject to what follows in respect of agricultural land, freehold property and property subject to deeds of fixed-period state grant may be freely acquired and disposed of by foreign investors. Land that is zoned agricultural is subject to the Land Control Act,¹⁶ which does not prohibit the acquisition by non-citizens of agricultural land and imposes an approval process supervised by the Ministry of Lands and Housing. Tribal leases are restricted to Botswana citizens or to corporate entities that have a minimum of 51 per cent citizen shareholding, except where the purchaser has been given an exemption by the Minister.¹⁷

Acquisition of Property for Public Purposes

The Acquisition of Property Act¹⁸ makes provision for the acquisition of property for public purposes. The President of Botswana is vested with the power to acquire any real property if the acquisition is necessary or expedient for the following reasons:

- The interests of defense, public safety, public order, public morality, public health, town and country planning, and land settlement; or
- The securing of the development or utilization of the property for a purpose beneficial to the community.¹⁹

When the President resolves to acquire property for the aforementioned reasons, the Minister is obliged to give notice to the persons interested in such property.²⁰ Botswana has a limited history of expropriation of land for public purposes and the Courts have dictated that such expropriations must be effected at a market-related price.

Tax

In General

Taxes in Botswana are administered and collected by the central government through the Botswana Unified Revenue Service (BURS), which was created under the Botswana Unified Revenue Service Act.²¹ BURS administers four revenue statutes: the Income Tax Act (ITA),²² the Value Added Tax Act (VAT Act),²³ the Customs and Excise Duty Act,²⁴ and the Capital Transfer Tax Act (CTT Act).²⁵

16 Land Control Act, chapter 32:11.

17 Tribal Land Act, chapter 32:02, section 20(1).

18 Acquisition of Property Act, chapter 32:10.

19 Acquisition of Property Act, chapter 32:10, section 3.

20 Acquisition of Property Act, section 5.

21 Botswana Unified Revenue Service Act, chapter 53:03.

22 Income Tax Act, chapter 52:01.

Income Tax

Income taxation is governed by the ITA and is paid on an annual basis by individuals and companies.²⁶ For individuals, the tax year runs for a continuous 12-month period commencing on 1 July and ending on 30 June. For companies and other legal entities, the tax year may correspond with their financial year. Income tax returns are to be filed with BURS within a three-month period at the end of any applicable tax year.

Income tax is source based and on the income of residents that is derived or deemed to have been derived from within Botswana.²⁷ Citizen residents are obligated to pay income tax on their world-wide income, but non-citizen residents are not so obliged. An individual is “resident” if his permanent place of residence is in Botswana or if he is physically present in Botswana not less than 183 days of the applicable tax year. A company is “resident” in Botswana if its registered office or place of incorporation is Botswana or if it is managed or controlled from Botswana.

Income taxes payable by individuals on their annual gross income are normally recovered from employers under the pay-as-you-earn (PAYE) salary deduction system and from withholding taxes payable on certain categories of income such as non-cash employment benefits, fees, commissions, bonuses, and gratuities.²⁸ Taxable income is determined as the aggregate value of gross income including capital gains but excluding exempt income and taxable allowances. Any individual with an annual gross income that exceeds BWP36,000 is required to register with BURS as a taxpayer. Individual income tax is levied at progressive rates of between five per cent and 25 per cent for annual gross income that exceeds the registration threshold.

Corporate tax is levied at the rate of 22 per cent on all taxable profits of resident companies and 30 per cent for non-resident companies. Manufacturing companies may apply to the Minister of Finance and Economic Development for a special tax rate that permits them to be charged at a rate of 15 per cent. In addition, the ITA provides for entities to apply for a certificate as International Financial Services Centre (IFSC) companies, which will enable them to be charged a corporate tax at a rate of 15 per cent (see text, below).

Value-Added Tax

Value-added tax (VAT) is governed by the VAT Act and is payable on the supply of goods and services as well as the importation of goods and certain services. The liability for VAT arises only when a person carries on a taxable

23 Value Added Tax, chapter 50:03.

24 Customs and Excise Duty Act, chapter 50:01.

25 Capital Transfer Tax Act, chapter 53:02.

26 Income Tax Act, Part II, Division II.

27 Income Tax Act, section 11.

28 Income Tax Act, Fifth Schedule.

activity. All persons who carry on a taxable activity where the value of taxable supplies exceeds BWP1,000,000 for a 12-month period will be required to register and account for VAT.

Once a person has registered for VAT with BURS, he must file returns for each successive tax period, which period is one month. VAT is levied at a rate of 12 per cent for standard-rated supplies and 0 per cent for zero-rated supplies. The following supplies are zero-rated and are not subject to VAT:²⁹

- Supply of sorghum, millet, wheat, sugar, and/or flour for human consumption;
- Fertilizers, specified pesticides, and farming tractors;
- Exportation of goods or services;
- International transport services; and
- Supply of goods or services for the personal or official use of the President of Botswana.

Double-Taxation Avoidance Agreements

Botswana is party to several double-taxation agreements with several states. In general terms, these agreements prevent the double taxation of the same income in two different jurisdictions. Botswana has entered into double-taxation avoidance agreements³⁰ with the following countries:

- Barbados;
- France;
- India;
- Lesotho;
- Mauritius;
- Mozambique;
- Namibia;
- South Africa;
- Swaziland;
- Sweden;
- United Kingdom;
- Zambia; and
- Zimbabwe.

²⁹ Value Added Tax, section 10.

³⁰ Income Tax Act, section 53(1).

Capital Transfer Tax

Capital transfer tax is levied on the transfer of property,³¹ whether movable, immovable, tangible, or intangible, by way of gift or inheritance. Capital transfer tax will be charged to a beneficiary for any disposals made to him in any applicable tax year. Capital transfer tax is levied at progressive rates of between two per cent and five per cent for individuals, while companies are charged at a flat rate of 12.5 per cent. Capital transfer tax is not chargeable on the following disposals:

- Disposal of property situated outside Botswana;
- Disposal by way of inheritance to a spouse on the death of the other spouse;
- Disposal of property by one spouse during their lifetime to, or for the benefit of, the other spouse;
- Disposal of livestock and/or produce that has been included as part of the donor's gross income;
- Value of any debt that is included in the gross income of the debtor; and
- Aggregate value of all casual gifts of not more than BWP5,000 donated to one person in any tax year.³²

Transfer Duty

Transfer duty is a tax levied on the transfer³³ of ownership in immovable property. Transfer duty is payable on all purchases for which VAT is not payable, with the exception of transactions involving tribal land. Transfer duty is calculated on the market value of the applicable land.

Transfer duty is levied at five per cent for citizens and non-citizens. For citizens, however, the first BWP 200,000 is exempt from this tax. Transfer duty is levied at the rate of 30 per cent for the purchases of agricultural land by non-citizens.

Customs Regulation

Botswana became a contracting party to the General Agreement on Tariffs and Trade (GATT) on 28 August 1987.³⁴ The core principles of the GATT include the Most-Favored-Nation (MFN) rule, the National Treatment rule, the principle of reduction and binding of national tariffs, and the prohibition of protective measures other than tariffs (subject to defined exceptions).

The rule of tariff reduction and binding requires members to state the maximum level of import duty or other charge and/or restriction that they will apply to imports of specified types of goods. These tariff-binding commitments are then

31 Capital Transfer Act, section 2(a) and (b).

32 Capital Transfer Tax, section 4.

33 Transfer Duty Act, section 2.

34 General Agreement on Trade and Tariffs, Restricted VAL/35, seventh annual review of the implementation and operation of the agreement background working document by the secretariat, 7 April 1988.

recorded in national schedules that become part of each country's obligations under the GATT, now known as the World Trade Organization (WTO). In the members' schedule of concessions up to April 2017,³⁵ Botswana's goods schedule concessions on agricultural products were identical to those contained in Schedule XVIII — South Africa with the exceptions of some agricultural products,³⁶ specifically ranging from 17 per cent to 25 per cent.

In addition to these concessions, the Customs and Excise Act stipulates that an importer and exporter must produce a bill of entry and pay all duties due on goods.³⁷ Customs duty as read with the goods schedule concessions are on a most-favored-nation (MFN) basis. The MFN rule is basic to the whole edifice of the WTO and, in terms of the rule, if a World Trade Organization (WTO) signatory grants to another country more favorable treatment in the form of reduction in the customs duty payable on imports of a particular product, it must immediately and unconditionally give the same treatment to imports from all signatories.

One of the exceptions to the MFN rule is that members of customs unions and free trade areas may give more favorable treatment to imports from one another, the so-called preferential tariff treatment. Botswana is a member of the Southern African Customs Union (SACU) that also comprises of South Africa, Lesotho, Swaziland, and Namibia. Goods imported into Botswana from other SACU member states attract only 12 per cent VAT and are free from customs duty. Goods imported from countries outside SACU attract customs duties at rates specified in the Botswana Customs and Excise Tariff Book, as amended.

Botswana also is a contracting party to the Southern African Development Community (SADC). In terms of the SADC Protocol on Trade, SADC member states are required to grant each other duty-free access of goods or reduced duty on an MFN basis. In order for the goods to enjoy trade concessions, they must be wholly produced or sufficiently worked as per the SADC Trade Protocol in Botswana. Prior to exportation, a SADC certificate of origin must be obtained from the BURS — Customs and Excise Division.

Botswana is a member of the Market Access Regulations for the Economic Partnership Agreement (EPA) and has benefited from the market access regulations provided for therein.³⁸ In order for the goods to be free of customs duty and to enjoy the trade concessions under the market access regulations of the EPA, they must be wholly produced or manufactured in Botswana. Goods are considered to be originating from Botswana if they are wholly produced in Botswana and do not contain materials imported from third countries. "Third countries" refers to countries that are not members of the European Union (EU) and SADC.

35 At the Market Access Committee meeting of 22 June 1999, it was agreed that Annex II of the WTO G/MA/63 Consolidated Tariff Schedules document (G/MA/63), setting out the situation of schedules of WTO Members, would be updated periodically.

36 Schedule XVIII — South Africa, part I — Most-Favoured-Nation tariff.

37 Customs and Excise Duty Act, section 41.

38 See www.bitc.co.bw/economic-partnership-agreements-epa.

Botswana exporters also may export certain goods under the African Growth Opportunity Act (AGOA) to the United States free of customs duty and quotas.³⁹ Products that can be traded under this scheme are both non-textile and textile products.

In order for a non-textile product to become eligible, it needs to be included in the list of the 6,500 products listed under the AGOA and the product must be wholly produced or grown in Botswana or a beneficiary Sub-Saharan country. If the raw material is sourced from outside any of the beneficiary Sub-Saharan countries, it must be ensured that the last stage of the manufacturing process takes place in an AGOA beneficiary country.

AGOA launched a National Response Strategy, which was developed through the assistance of the United States Agency for International Development (USAID) Southern Africa Trade and Investment Hub, in 2017.⁴⁰ The purpose of the strategy is to help local businesses grow by taking advantage of the AGOA provision of duty-free exports to the United States of America. The strategy focuses on the beef, textile, arts and crafts, as well as jewelry sectors.

Another preferential tariff treatment is in the Botswana-Zimbabwe Trade Agreement that accords goods originating from Botswana and exported to Zimbabwe duty-free treatment.⁴¹ Goods that meet a minimum of 25 per cent local content as per this trade agreement are exempted from payment of customs duty.

Excise duty and local taxes will be due and payable where applicable. Traders (manufacturers or their agents and wholesalers) who wish to export to Zimbabwe under this trade agreement must register with the BURS Customs and Excise Division.

Article 4 of the Botswana–Zimbabwe Trade Agreement requires that where goods are manufactured using materials from outside the two trading partners, the manufacturing should take place in Botswana.⁴² The prospective registrant is therefore required to submit price data for the purposes of calculating the local content of the goods to be exported. If the local content of the goods meets the minimum 25 per cent required, the company will be registered to export to Zimbabwe duty free and will be given a registration number.

Botswana also offers preferential tariff treatment in customs rebates that are conditional exemptions from payment of customs duties afforded certain specified industries registered with the BURS. Industrial rebates, specified under the Third Schedule of the Customs and Excise Act, are normally granted to manufacturers who import raw materials from outside SACU for production of

39 African Growth Opportunity Act.

40 Government of Botswana, National AGOA Strategy, September 2017.

41 Botswana–Zimbabwe Trade Agreement.

42 Botswana–Zimbabwe Trade Agreement, Article 4.

goods for domestic consumption. The industrial rebates offer a full or partial exemption of customs duty.⁴³

Botswana also has a Duty Drawback System specified in Schedule 5 of the Customs and Excise Act, in which manufacturers that produce goods for purposes of exporting are allowed to pay duty on their imported raw materials that they can claim after their products have been exported.⁴⁴ They are to claim the refund within six months of export of goods.⁴⁵

Currency Regulation

Implementation of currency regulation is entrusted to the Central Bank, the Bank of Botswana (BOB).⁴⁶

Capital and Profit Transfer

Botswana has abolished all exchange control regulations (although reporting of in-flows and out-flows of currency remains an extant obligation on currency traders). Dividends and capital gains on equity investments received from a foreign source are, subject to tax being paid, freely remitted out of Botswana in foreign currency.⁴⁷ Residents and non-residents are free to operate foreign currency accounts at local banks. Investors can repatriate dividends and profits from Botswana freely.⁴⁸

Investment Incentives

In General

The Botswana government has launched a number of initiatives to promote economic activity and foreign investment in specific areas, including the establishment of hubs for agriculture, innovation, diamonds, and education. Through these hubs, investors can access information and assistance. There is no minimum required investment from investors.⁴⁹

However, financial institutions such as the Botswana Development Corporation (BDC) require a minimum contribution from the investor of 25 per cent of the total project cost.⁵⁰ Botswana also has a low general tax rate.⁵¹ At present,

43 Customs and Excise Act, Third Schedule.

44 Customs and Excise Act, Third Schedule, paragraph 3.

45 Customs and Excise Act, Fifth Schedule.

46 See <http://www.bankofbotswana.bw/content/2009112317043-national-currency-the-pula>.

47 See <https://home.kpmg.com/xx/en/home/insights/2011/12/botswana-income-tax.html>.

48 See <http://www.gov.bw/en/Business/Sub-audiences/Investors/Policies--Licensing/>.

49 See <http://www.gov.bw/en/Business/Sub-audiences/Investors/Foreign-Investors/>.

50 See <http://www.bdc.bw/faqs> and <http://www.gov.bw/en/Business/Sub-audiences/Investors/Foreign-Investors/>.

resident companies pay corporate tax at 22 per cent of the taxable income and the general rate of withholding tax is 7.5 per cent on all dividends distributed. In addition to the above, the newly established Botswana Investment and Trade Centre (BITC) serves as the government's investment promotion, export development, and national branding unit. Its role is to attract and assist investors and export development. A more detailed analysis of the relevant investment incentives and BITC's role follows below.

Botswana Investment and Trade Centre

As highlighted above, BITC⁵² provides an in-house business facilitation service center that provides the following services to local and international investors:

- Company and business registration;
- Trade and business license applications;
- Entry visas, and work and residence permits;
- Work permit exemptions;
- Connection of utilities, *e.g.*, power, telecommunications, and water;
- Income tax and vat registration;
- Access to industrial and commercial land;
- Facilitation of construction permits;
- Allocation of BITC factory space (subject to availability);
- Environmental impact assessment compliance;
- Provision of information on the Botswana business client, regulatory regime, and investment opportunities; and
- Opening a bank account.

The Government encourages foreign financial services providers wishing to set up banks, insurance companies, administration and holding companies, fund managers, and those wishing to undertake business process outsourcing and call centers to use BITC.

Furthermore, BITC operates a resource and reference center⁵³ that was established through the Joint Integrated Technical Assistance Program, a jointly implemented program by BITC, the United Nations Conference on Trade and Development and the World Trade Organization. The center disseminates appropriate trade and investment promotion related information and is open to government officials, the business community, academia, students, and the public.

51 See <http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Finance-and-Development-Planning1/Parastatals121/Understanding-Financing/>.

52 See <https://home.kpmg.com/bw/en/home/media/press-releases/2013/06/botswana-investment-guide.html>.

53 See <http://www.bitc.co.bw/bitc-reference-information-resource-centre>.

Sector Hubs

The Government has set up various hubs to serve as information and assistance centers for investors.⁵⁴ The sectors are:

- The Transport Hub identifies and coordinates key projects and policy interventions required to develop Botswana as a transport hub in the Southern African Development Community. It strives to transform the transport and logistics into a major growth sector in order to stimulate economic diversification.
- The Education Hub aims to encourage leading international universities to establish schools and programs with a strong emphasis on sustainable development and in support of the market sectors earmarked for growth and is in charge of the new Botswana International University of Science and Technology.
- The Innovation Hub seeks to attract FDI in hi-tech business such as information and communication technology, biotechnology, and mineral technologies. It further seeks to attract investment opportunities in call centers, software development, data capture, and processing systems. Companies accredited by the Innovation Hub are entitled to a reduced rate of corporate tax of 15 per cent.
- The Health Hub is in charge of growing medical services, focusing on research and innovation as well as attracting medical tourism and investment in medical services and pharmaceutical manufacturing.
- The Diamond Hub seeks to establish Botswana as a global diamond center encouraging diamond trading, cutting, polishing, marketing, and jewelry manufacturing to take advantage of the country's diamond deposits.
- The Agricultural Hub focus is on commercializing agricultural production and improving food security in Botswana. Agricultural subsectors have been prioritized to attract investment. The Government also wants to tap into the country's high import bill of variety of foodstuffs through import substitution.

Funds

Grants are available to foreign investors who partner with Botswana citizen through a number of Government agencies. For example, a venture capital fund has been established under the Citizen Entrepreneurial Development Agency (CEDA) to provide equity capital to citizens and ventures between citizens and foreign investors.⁵⁵ Furthermore, the Botswana Development Corporation (BDC) is a Government-owned company that provides loan facilities to citizens and foreign-owned entities funds and/or provides premises, in order to develop companies so that they can increase local skills and employment.⁵⁶

⁵⁴ See <http://www.bitc.co.bw/hubs>.

⁵⁵ See http://www.ceda.co.bw/sites/default/files/2011_GUIDELINES%20with%20ISO.pdf.

⁵⁶ See <http://www.bdc.bw/sites/default/files/BDC%20Annual%20Report%202014%20%28Web%29.pdf>.

Insurance

Botswana is a member of the Multilateral Investment Guarantee Agency,⁵⁷ which offers investors protection against non-convertibility or transfer of currency, expropriation, breach of contract, war, and civil unrest.

Furthermore, through Botswana Export Credit Insurance and Guarantee Company investors can purchase coverage against certain events and losses such as insolvency and inability of buyers to pay for purchases, unanticipated import restrictions, and/or blockage by the buyer's country of foreign exchange transfer.

Access to Expanding Double-Taxation Avoidance Treaty Network

As set out above, Botswana has a growing network of Double Taxation Avoidance Agreements (DTAAs).⁵⁸ There are 13 treaties in force, and a further 12 at various stages of negotiation and ratification.

International Financial Services Company Certification

The International Financial Services Company (IFSC)⁵⁹ offers a range of tax incentives to approved companies that certification is provided for in terms of the ITA. Once granted, IFSC entities are entitled to:

- Flat 15 per cent corporate tax rate;
- No withholding tax on dividends, interest, royalties, and management fees;
- Unilateral credit for withholding tax suffered in other jurisdictions whether or not a double-taxation agreement exists; and
- Specified collective investment undertakings managed by IFSC companies being tax exempt.

Requirements for International Financial Services Company

To become an IFSC company,⁶⁰ a company registered in Botswana must make a formal application to the International Financial Services Centre Certification Committee through BITC.

Once the activities proposed to be carried out by the applicant are accepted as being suitable for certification, the Committee will make a recommendation to the Non-Bank Financial Institutions Regulatory Authority who will issue a certificate. The certificate will stipulate the approved activities and conditions of the company and will remain in force unless revoked.

⁵⁷ See <https://www.miga.org/who-we-are/member-countries>.

⁵⁸ See <https://home.kpmg.com/bw/en/home/media/press-releases/2013/06/botswana-investment-guide.html>.

⁵⁹ Botswana Investors Handbook, Botswana Investment and Trade Centre, at pp. 90 and 91.

⁶⁰ Botswana Investors Handbook, Botswana Investment and Trade Centre, at pp. 90 and 91.

Activities Eligible for Certification

The following are approved financial operations as broadly defined in the ITA, provided they are carried on with non-residents or IFSC companies:

- Banking and financing operations transacted in foreign currency;
- Broking and trading of securities denominated in foreign currency;
- Investment advice;
- Management and custodial functions related to CIUs;
- Insurance and related activities;
- Registrars and transfer agency services;
- Exploitation of intellectual property;
- Development and supply of computer software for use in the provision of the aforementioned services;
- Accounting and financial administration;
- Business process outsourcing and call centers;
- Shared financial services;
- Mutual funds; and
- Other operations that the Minister may declare by order to be approved financial operations from time to time.

Development Approval Order

The Minister of Finance and Development Planning has the authority to issue a Development Approval Order (DAO) for specific projects.⁶¹ The DAO provides special tax relief and/or education and training grants of different types and rates. Zero-rate tax holidays between five and 10 years can be obtained through the DAO.

Requirements for Development Approval Order

The Minister must be satisfied that the proposed project will be beneficial to Botswana.⁶² Any firm, local or foreign, may apply to the Permanent Secretary for Finance and Development Planning for a DAO. Applications are evaluated against the following criteria:

- Job creation for Botswana citizens;
- Company training plans for Botswana citizens;
- Company's plan to localize non-citizens' positions;
- Amount of equity held by Botswana citizens in the company;

⁶¹ See <http://www.gov.bw/en/Business/Sub-audiences/Investors/Foreign-Investors/>.

⁶² See <http://1govportal.imexsystems.net/en-gb/Citizens-Residents/Employment/Pages/Taxation-in-Botswana.aspx>.

- Location of the proposed investment;
- Effect on stimulation of other economic activities; and
- Effect on reducing local consumer prices.

Competition Law

Competition law is governed by the Competition Act and the regulations promulgated therein. The Competition Act establishes the Competition Authority (the Authority) as the primary enforcement agency responsible for the prevention and redress of anti-competitive practices in the economy and the removal of constraints on the free play of competition in the market.⁶³

The Competition Commission (the Commission) is the independent governing body responsible for the affairs of the Authority.⁶⁴ The Competition Act is enforced by the Authority, the Commission, and the High Court of Botswana. The Competition Act regulates mergers, restrictive practices, and abuse of dominance. A merger occurs when one or more enterprises directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another.⁶⁵ Control may be achieved by the purchase or lease of shares, an interest, or the assets of the other enterprise or Amalgamation or other combination with that enterprise.⁶⁶ A merger is notifiable if it meets the following prescribed thresholds:⁶⁷

- The turnover in Botswana of the enterprise or enterprises being taken over exceeds BWP10,000,000;
- The assets in Botswana of the enterprise or the enterprises being taken over have a value exceeding BWP10,000,000; or
- The enterprises concerned would, following implementation of the merger, supply or acquire 20 per cent of a particular description of goods and services in Botswana.

In relation to this requirement, even where an acquiring firm has no presence in Botswana but acquires control of a target firm with a market share of 20 per cent or more in a relevant market, the merger thresholds will be triggered because, on a strict reading of the Competition Act, post-merger the acquiring firm will have a market share of 20 per cent or more. Put differently, there is no need for an accretion in market share in order for the notification obligation to be triggered. The Competition Act applies to all economic activity within or having an effect within Botswana. Accordingly, foreign to foreign mergers are notifiable if the

63 Competition Act, section 5(1).

64 Competition Act, section 9.

65 Competition Act, section 52(1).

66 Competition Act, section 52 (2).

67 Competition Act, section 54.

merger involves economic activity within or having an effect within Botswana and where the prescribed thresholds are met.

Where the Authority reasonably suspects that a merger has occurred without the relevant notification, it has the power to order the parties to submit information regarding the suspected merger⁶⁸ and/or can restrain them from implementing the merger or take steps such as disposal of assets that would pre-empt the taking of remedial action against them. The Authority may engage in an investigation to determine that a merger has been implemented in contravention of the Competition Act. Where it is satisfied that this has transpired, it may give direction to the enterprises involved as follows:

- Not to implement the merger;⁶⁹
- To sell or dispose of in any other specified manner any shares, interest, or other assets it has acquired pursuant to the merger;⁷⁰
- To terminate any agreements or provisions of an agreement to which the merger was subject;⁷¹ and
- To take such further measures as may be necessary to restore the conditions of competition existing prior to the merger.

Abuse of Dominance

An enterprise may be considered dominant if the enterprise supplies or acquires at least 25 per cent of the goods or services in the market; or three or fewer enterprises supply or acquire at least 50 per cent of the goods or services in the market.

The Competition Act refers to a dominant position as “a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors”.

The Competition Act does not prohibit dominance.⁷² It is not in itself a breach of the law for an enterprise to be dominant, but such enterprises have a responsibility to ensure that they are not abusing or exploiting any market power this position confers upon them.

An abuse may occur where the dominant enterprise engages in certain restrictive and anti-competitive practices, such as charges an excessive price to the detriment of consumers; refuses to give a competitor access to an essential

68 Competition Act, section 63 (1)(b).

69 Competition Act, section 63(2)(a).

70 Competition Act, section 63(2)(b).

71 Competition Act, section 63(2)(c).

72 Competition Act, *see* http://www.competitionauthority.co.bw/sites/default/files/ABUSE_OF_DOMINANCE.pdf.

facility when it is economically feasible to do so; engages in exclusionary act; or engages in a concerted practice.⁷³

Restraints

The Competition Act prohibits both vertical and horizontal practices. The authority may prohibit any horizontal agreement that limits or controls production, market outlets or access, technical development or investment, or applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive advantage, and makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions that, by their nature or according to commercial usage, have no connection with the subject of such contracts.⁷⁴

Resale price maintenance is per se unlawful, however, a supplier may recommend a resale price if the supplier makes it clear that the price is not binding and that the product labelling makes it clear that the price is recommended.⁷⁵ Restrictive practices may be prohibited if such conduct is found to have the object or effect of reducing competition in any market within the jurisdiction of the Authority.

The provisions relating to restrictive practices will not apply to inter-connected parties or parties that share some degree of common ownership and control. In addition, to the extent that an agreement constitutes a designated professional rule, imposes obligations arising from a designated professional rule, or constitutes an agreement to act in accordance with such rules, the provisions of the Competition Act relating to restrictive agreements and dominance will not apply.⁷⁶

Where the Commission establishes that a party is engaging in a restrictive practice, the Commission may issue a directive to end the breach, including a direction to terminate or modify the agreement in question if it is still in force.⁷⁷ In addition to a cease and desist order, the Commission may impose a financial penalty on the breaching enterprise or enterprises, which penalty will not exceed 10 per cent of the turnover of the breaching enterprise, calculated for the duration of the period that the breach existed.⁷⁸

In calculating the financial penalty, the Commission may have regard to the gravity of the infringement and the recurrence or duration thereof.⁷⁹ While there are no criminal sanctions expressly provided in the Competition Act where the provisions in respect of cartel conduct have been contravened, the Competition Act does provide for criminal sanctions, primarily for those individuals who are

73 Competition Act, section 5(1).

74 Competition Act, Part V.

75 Competition Act, section 25.

76 Competition Act, section 29.

77 Competition Act, section 27(2).

78 Competition Act, section 27(2).

79 Guidelines of the Competition Commission on the principles to be used in determining any penalty imposed in terms of sections 25 and 26 of the Competition Act.

found to have inferred in an investigation.⁸⁰ When assessing a penalty, the Commission will take into account the following aggravating factors (the list is not exhaustive):

- Involvement of senior managers and directors in the infringement;
- Repeated infringement by the same enterprise;
- Whether an infringement is intentional, rather than merely negligent;
- Engagement in coercive or retaliatory measures against a leniency applicant;
- Continuation of the infringement after the authority commenced the investigations;
- Acting as a leader or instigator of the infringement (in other words, whether the enterprise was a ringleader); and
- Coercing other enterprises to continue with the infringement.⁸¹

The following may constitute mitigating factors in the assessment of a financial penalty (the list is not exhaustive),⁸² as to whether the enterprise under investigation:

- Acted under severe duress or pressure;
- Was genuinely not sure or uncertain as to whether the agreement or conduct at issue constituted an infringement of the Competition Act;
- Took adequate steps to ensure compliance with sections 25 and 26(1) of the Competition Act;
- Terminated the infringement as soon as the authority intervened; and
- Cooperated with the Authority to enable the enforcement process to be concluded speedily and effectively.

Intellectual Property

Copyright

The Copyright and Neighboring Rights Act (CNR Act)⁸³ protects copyright work that is considered original in the literary or artistic domain, as listed in section 3, which includes but is not limited to books, pamphlets, articles, computer programs, speeches, and audio-visual works. The constitutional aspects of this protection stems from the Constitution of Botswana that protects the right to freedom of expression, a core element of copyright.⁸⁴ The protection of literary and artistic works applies to:

- Works of authors who are nationals of, or have their habitual residence in, Botswana;

80 Competition Act, section 76.

81 Competition Act, section 9.

82 Copyright and Neighboring Rights Act, section 10.

83 Copyright and Neighboring Rights Act, chapter 68:02.

84 Constitution of the Republic of Botswana, section 12.

- Works first published in Botswana, and works first published in another country and published in Botswana within 39 days of their first publication, irrespective of the nationality or residence of their authors;
- Audio-visual works, the producer of which has his headquarters or habitual residence in Botswana; and
- Works of architecture erected in Botswana and other artistic works incorporated in a building or other structure located in Botswana.⁸⁵

For a work to be protected in Botswana, it need not be fixed in a tangible medium.⁸⁶ CIPA supervises the activities of the Copyright Society of Botswana (COSBOTS) that is mandated to license and collect royalties from users of copyright works to distribute to copyright owners. COSBOTS also controls the right to publicly display or use non-music protected works such as paintings, sculptures, engravings, and works of applied art by business establishments in Botswana. Copyright need not be registered since it automatically belongs to the author or performer.

Patents

The Industrial Property Act (IPA)⁸⁷ replaced the Patent and Designs Protection Act that was inherited at independence and was in force until 1996. The IPA established a Registrar of Marks, Patents and Designs, whose function and mandate has been taken over by CIPA.

In terms of the IPA,⁸⁸ only inventions are patentable. An invention is an idea of an inventor that permits in practice the solution to a specific problem in the field of technology.⁸⁹ Three conditions must be met for such an invention to be patentable, namely:

- Novelty;
- Inventive step; and
- Industrial application.

A patent is valid for 20 years after registration.⁹⁰ The IPA confers exclusive rights to a patentee to exploit or authorize the exploitation of his/her patent. There are some exceptions to this right and they include compulsory licensing, parallel importation and exhaustion, and government use. These exceptions are in consonance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994, to which Botswana is a signatory.

85 Copyright and Neighboring Rights Act, section 35.

86 Copyright and Neighboring Rights Act, section 6.

87 Industrial Property Act, chapter 68:03.

88 Industrial Property Act, section 2.

89 Industrial Property Act, section 8.

90 Industrial Property Act, section 10.

To register a patent, one must complete the application for a patent or utility model certificate. All applications will be examined prior to grant of a patent. Substantive examination of the patent application will be carried out by the African Regional Intellectual Property Organization (ARIPO). If the applicant is not a resident of Botswana, he must appoint an agent by filing a Power of Attorney that may be filed within one month from the date of filing of the application. The Registrar may, upon request by the applicant, extend the time for filing the power of attorney.

The applicant may, at any time before the patent is granted, make amendments to his application, if the amendment does not go beyond the original disclosure. Any amendment will be subject to the payment of a fee. CIPA requires an annual fee payable for the first and each subsequent year following the international filing date. Annual fees are due on the eve of each anniversary of the international filing date. If the patentee has defaulted, he may still make payment of annual fees within 6 months from the due date, subject to the payment of a surcharge.

Trade Marks

An exclusive right to a mark is acquired by registration.⁹¹ Registration of a mark confers on the registered owner the right to exclusive ownership of that mark and to prohibit third parties from using the mark, including the right to institute court proceedings against any person infringing his rights.

To register a trade mark, one must make an application⁹² for the registration of a mark accompanied by a cover letter/application letter, one or more reproductions of the mark, a list of the goods or services for which registration of the mark is requested, and such fees as may be prescribed. The applicant may, at any time before his mark is registered, withdraw his application. The filing date of an application for the registration of a mark is deemed the date on which the application is received by CIPA.

The Registrar will examine the application to determine whether it complies with the requirements of the IPA. The Registrar will accept the application if he or she is satisfied that the application complies with the requirements of the IPA and register the mark in the appropriate register. The Registrar will issue, to the applicant, a certificate of registration and publish a reference to the registration of the mark in the Journal of Marks. Where the requirements for the registration of a mark are not satisfied, the Registrar will refuse to register it.

A person may oppose the registration of a mark because it does not comply with the definition of a mark as specified in the IPA or any requirement therein by giving the Registrar notice of such opposition. When registration is opposed, the applicant retains the same rights and privileges as he would have if the mark had been registered between the application for registration and until the registration

91 Industrial Property Act, section 74.

92 Industrial Property Act, section 76.

of the mark. Where the registration of a mark has been successfully opposed, the Registrar will refuse to register that mark.

Industrial Designs

An industrial design can only be registered if it is considered new.⁹³ A design is deemed new if, prior to the filing date, it has not been disclosed to the public anywhere in the world by publication in a tangible form, or by use or in any other way.

In order to register an industrial design, an application⁹⁴ for the registration of a design should be made to the Registrar accompanied by a request, in writing, for the registration of the design; drawings, photographs, or other graphic representations of the article embodying the design; or a specimen of the article embodying where the design is two-dimensional and a statement indicating the kind of products for which the design is to be used.

Where the applicant is not the creator of the design, he should furnish proof of his title or authority to apply for registration. This includes designs made in execution of a contract of employment, in which case the design will belong to the employer in the absence of any agreement to the contrary.

The applicant may, at any time before the registration of a design, withdraw his application. Where the application does not comply with the requirements stipulated above, the Registrar will request the applicant to supply the information or representation missing in the application, and will accord as the filing date, date on which the missing elements are filed. The application will be treated as though it had never been filed if the applicant fails to comply with the request.

In examining the application, the Registrar will determine whether it complies with the requirements of the IPA and whether it is or not contrary to public order or morality. If the Registrar is satisfied that the requirements of the IPA have been fulfilled, he will register the design and will issue, to the applicant, a certificate of registration of the design; a record of registration in the register; and publish it in the Journal of Designs.

Where two or more people have made a design jointly, the right to the design belongs to them jointly. Where they have made the same design independently of each other, the person whose application bears the earliest filing date or the person whose application bears the earliest validly claimed priority date will have rights to the design, unless he abandons, withdraws, or his application is rejected by the Registrar. Registration of a design confers on it the right to prevent third parties not having the owner's consent from exploiting the design in Botswana, and from making, importing, or selling any article bearing the design or a design that is substantially similar or is identical to the registered design.

93 Industrial Property Act, section 45.

94 Industrial Property Act, section 46.

Employment Law

In General

The basic guidelines for employment in Botswana are provided under the Employment Act.⁹⁵ Employment and labor law and policy are based on:

- Statutes;
- Treaties;
- Common Law;
- Express agreement of parties; and
- Usage and practice.

Working Hours

An employee cannot be required to work for more than eight hours a day or 48 hours a week, except in certain circumstances provided under the Employment Act.⁹⁶ However, the number of working hours per day may be extended to nine where the working week is five days.⁹⁷

Wages

The contract of employment usually sets out the terms of the employee's remuneration. The employer must remunerate the employee in accordance with the employment contract. Except for casual workers, employees cannot be paid their wages in a wage period less than one week or more than one month.⁹⁸ Wages are to be paid within three working days of the end of the wage period.⁹⁹ An employer is permitted to deduct the following from the wages of an employee:

- Deductions in respect of tax;
- Pension or provident fund contributions;
- Unauthorized absences from work;
- Overpayment of wages;
- Cost of meals provided at the request of the employee; and
- Amenities and services supplied by the employer as may be authorized by the Commissioner of Labor.¹⁰⁰

95 Employment Act, chapter 47:01.

96 Employment Act, section 95(1)(b).

97 Employment Act, section 95(1)(b)(ii).

98 Employment Act, section 74(1).

99 Employment Act, section 75.

100 Employment Act, section 80(1).

Rest Periods

All employees, with the exception of shift workers, are entitled to a rest day of at least 24 consecutive hours, in every period of seven days, which period must be or include a Sunday.¹⁰¹ In instances where the rest day is or includes days other than a Sunday, the employer must prepare a roster of rest days showing the rest periods for the month and display the roster in a conspicuous place readily accessible to the employee not less than seven days prior to the commencement of the month in question.¹⁰² Employees engaged in shift work are to be granted 30 consecutive hours of rest in any period of seven consecutive days.¹⁰³

Public Holidays

Botswana has a number of gazetted paid public holidays.¹⁰⁴

Annual Leave

Employees are entitled to a minimum of 15 working days of paid leave per year.¹⁰⁵ Leave days not taken may be accumulated for up to three years.¹⁰⁶ If the employment contract is terminated by either party, the employee must be paid for any outstanding accumulated leave.¹⁰⁷

Sick Leave

An employee is entitled to a minimum of 20 working days' paid sick leave in any one year of continuous employment. The employee must inform the employer as soon as possible and provide a doctor's certificate if they are absent from work for more than 24 hours.¹⁰⁸

Maternity Leave

Female employees are entitled to maternity leave totaling 12 weeks (six weeks before and six weeks after confinement) after the employer has been presented with a certificate signed by a medical officer or registered nurse and midwife.¹⁰⁹

Paternity Leave

The Employment Act does not provide for paternity leave; it is granted at the employer's discretion.

101 Employment Act, section 93(1).
102 Employment Act, section 93(3).
103 Employment Act, section 93(1).
104 Employment Act, Second Schedule.
105 Employment Act, section 98(2).
106 Employment Act, section 98(4).
107 Employment Act, section 98(6).
108 Employment Act, section 100(1).
109 Employment Act, section 113.

Termination of Employment

An employer or employee may terminate the contract of employment by giving notice.¹¹⁰ Notice also applies when an employee is on probation. Payment equivalent to the amount that the employee would have received during the period of notice may be made in lieu of giving notice. It is unlawful for an employer to terminate a contract of employment for any of the following reasons:

- Employee's membership of a registered trade union or participation in any activities connected with a registered trade union outside working hours or with the consent of the employer, within working hours;
- Employee seeking office as or acting as a representative of other workers;
- Employee making a complaint or participating in proceedings against the employer in good faith for the violation of any law;
- Because of the employee's race, tribe, place of origin, marital status, gender, sexual orientation, color, creed, health status, or disability; or
- A reason that does not affect the employee's ability to perform his/her duty under the contract of employment.¹¹¹

Severance

An employee who has been employed by the same employer for 60 months continuously is due to receive a severance benefit, whether the contract of employment has been terminated or not.¹¹²

This is calculated at the rate of one day's basic pay for each month worked during the first 60 months of continuous employment and two days' basic pay for each additional month of continuous employment. This benefit is not due to employees who will receive a gratuity or a pension at the end of their contract of employment.¹¹³

Employment of Non-Citizens

The employment of expatriates in Botswana is regulated by the Employment of Non-Citizens Act.¹¹⁴ A non-citizen may only be employed upon acquiring a work permit or certificate of exemption.¹¹⁵ The Employment of Non-Citizens Act provides for categories of non-citizens that are exempted from holding work permits.¹¹⁶ Work permits are obtained on application from the Ministry of Employment, Labor Productivity, and Skills Development.

110 Employment Act, section 18(2).

111 Employment Act, section 23.

112 Employment Act, section 27(1)(i).

113 Employment Act, section 27(1)(ii).

114 Employment of Non-Citizens Act, chapter 47:02.

115 Employment of Non-Citizens Act, section 4(1).

116 Employment of Non-Citizens Act, Schedule.

Workers' Compensation

The Workers' Compensation Act¹¹⁷ makes it mandatory for employers to compensate employees that are temporarily or permanently disabled in the cause of their employment, or employees who contracted occupational diseases as a result of their work.¹¹⁸ The compensation due towards employees that have been fatally injured is calculated in the Workers' Compensation Act.¹¹⁹ All employers are obliged to take out workers' compensation insurance cover with a prescribed insurance company.¹²⁰

Banking Law

The banking industry in Botswana is regulated by the Banking Act and accompanying subsidiary regulations, together with the Financial Intelligence Act (FIA) and accompanying subsidiary regulations.¹²¹ The Central Bank, BOB, which is responsible for monetary policies, central banking services, supervision of licensed banks, issuing of bank notes, implementing exchange rate policies, administering exchange controls, and foreign exchange reserves management.¹²² There are 10 commercial banks registered as such in Botswana,¹²³ namely:

- African Banking Corporation of Botswana Limited;
- Bank Gaborone Limited;
- Bank of Baroda (Botswana) Limited;
- Bank of India (Botswana) Limited;
- Barclays Bank of Botswana Limited;
- Capital Bank Limited;
- First National Bank of Botswana Limited;
- Stanbic Bank Botswana Limited;
- Standard Chartered Bank Botswana Limited; and
- State Bank of India (Botswana) Limited.

In addition, there are other financial institutions that are mostly government-owned that are involved in the banking sector, namely:

- The Botswana Savings Bank (originally the Post Office Savings Bank, which was established in 1911 as a branch of the South;

117 Workers' Compensation Act, chapter 47:03.

118 Workers' Compensation Act, section 3.

119 Workers' Compensation Act, section 13.

120 Workers' Compensation Act, chapter 47:03, sections 31–37.

121 Banking Act, chapter 46:04, and Banking Regulations (1995), Banking (Anti-Money Laundering) Regulations (2003), Financial Intelligence Act (FI Act), chapter 08:07, and Financial Intelligence Regulations (FI Regulations).

122 See <https://www.export.gov/article?id=Botswana-banking-systems>.

123 See <http://www.bankofbotswana.bw/index.php/content/2009103015021-banks>.

- The African Post Office Savings Bank, which has the longest continuous existence of any financial institution in Botswana);
- The National Development Bank (established in 1964, initially with a focus on lending to agriculture); and
- The Botswana Building Society (BBS), originally established as a branch of the South African United Building Society in 1970, and locally incorporated in 1977.

On 24 August 2017, BBS shareholders passed a Special Resolution allowing the Society to commence the demutualization process for purposes of enabling it to become a company limited by shares and thereafter apply for a banking license in order to become a commercial bank.¹²⁴

Licensing

The Banking Act provides that no person may transact “banking business” in Botswana without a valid license issued by BOB.¹²⁵ The Banking Act defines banking business as:

“ . . . the business of accepting deposits of money repayable on demand or after fixed periods or after notice, as the case may be, by check or otherwise; and/or the employment of deposits in the making or giving of loans, advances, overdrafts or other similar facilities, and in the making of investments or engagement in other operations authorized by law under customary banking practice for the account of, and at the risk of, the person or persons accepting such deposits, and includes the discounting of commercial paper, securities, and other negotiable instruments for the purpose of extending loans or other credit facilities.”¹²⁶

Furthermore, foreign banks incorporated outside Botswana may not, without the written approval of BOB, establish a representative office in Botswana to carry out any banking business.¹²⁷ A representative office is defined as the office providing any financial or banking activities in Botswana on behalf of such foreign bank.¹²⁸

No applicant may be granted a banking license unless it is incorporated as a company limited by share capital under the Companies Act and BOB is satisfied that the applicant is a fit and proper recipient of a banking license.¹²⁹ BOB takes into consideration the technical knowledge, integrity, experience, financial condition, and history of the applicant, the adequacy of its capital, the character of its business, and the experience and qualifications of its management, the

124 See <https://www.bbs.co.bw/botswana-building-society-thanks-members-supporting-demutualisation-process>.

125 Banking Act, chapter 46:04, section 3(1).

126 Banking Act, chapter 46:04, section 2.

127 Banking Act, chapter 46:04, section 4(1).

128 Banking Act, chapter 46:04, section 4(5).

129 Banking Act, chapter 46:04, section 8.

convenience and needs of the community and market to be served, and the ability and willingness of the applicant to comply with any conditions the Central Bank may impose pursuant to the Act.¹³⁰ An applicant for a banking license must produce the following corporate documents and information:

- The name, nationality, and address of the applicant;
- Certified copies of the applicant's certificate of incorporation in Botswana and the memorandum and articles of association;
- The name and curriculum vitae of the initial directors and principal officers, with a clear indication of the particular responsibilities to be assumed by each officer;
- Details of the shareholding of the applicant and prospects for local shareholding;
- A list of associate companies in or outside Botswana doing banking business or engaged in any financial undertaking, such as insurance, or brokerage;
- Such audited accounting and financial data as may be required by BOB, including the balance sheet of the applicant as from 90 days prior to the date of application;
- The business plan of the applicant over a period of five years from the start of operations in Botswana, including scale of envisaged operations, any specialized services, and financial projections;
- The proposed principal place and other places of business of the applicant in Botswana, and a schedule of any proposed branch and agency network;
- The proposed initial capital of the applicant;
- Any proposed back-up capital in case of need, and a declaration of its availability in Botswana;
- In the case of a foreign applicant, the name of any supervisory authority and the country of incorporation;
- In the case of an agent acting on behalf of a principal, a written authorization by the principal; and
- Any other information that BOB may deem necessary to complete the assessment of the application.¹³¹

Every applicant for a license must pay to BOB a non-refundable fee of BWP 15,000 for the processing of the application. Within six months of receipt of the application, BOB may reject it or grant an applicant a banking license. After the grant of the license, the applicant will be liable to pay an annual fee of BWP 50,000.¹³²

130 Banking Regulations, chapter 46:04, Regulation 4.

131 Banking Regulations, chapter 46:04, Regulation 3(1).

132 Banking Act, Regulation 3(3).

Renewal of Banking License

Banking licenses are issued for an indefinite period subject to payment of annual fees.

Time Needed to Acquire Banking License

An investor needs a minimum of six months to complete all the steps and procedures in acquiring a banking license.

Capital Structure and Regulatory Requirements

The minimum capital requirement to establish a bank is BWP 5-million.¹³³ The statutory capital adequacy ratio stipulates that unimpaired capital¹³⁴ must equal at least eight per cent of risk-weighted assets.¹³⁵ Where a bank fails to maintain its unimpaired capital at the required level, BOB may impose on and collect from it a levy not exceeding 0.1 per cent of the amount by which such an unimpaired capital falls short of the prescribed amount.¹³⁶

BOB also imposes a “safe and prudent” capital adequacy ratio of 15 per cent for all banks in Botswana. It also is required that core capital constitutes at least 50 per cent of total capital.¹³⁷ Furthermore, every bank must maintain in Botswana, on a daily basis, liquid assets and will report monthly to the BOB the liquid assets held by it during the previous month.¹³⁸ Such reports will be made in the format specified by the Central Bank and will be submitted to that Bank within 21 calendar days of the end of each month. Besides capital adequacy requirements, there are regulatory requirements relating to:

- The ability to transfer a banking license;¹³⁹
- The ability to open or keep open or keep closed an existing place of business or change its location;¹⁴⁰
- Ability to establish a subsidiary in Botswana and outside Botswana;¹⁴¹
- Concentration of lending;

133 Banking Act, section 13(9) and Regulation 7(3).

134 Unimpaired in relation to the capital of a bank means the absence of any legal or technical covenant, term, restriction, or encumbrance which would otherwise render such capital not to be freely available for distribution to depositors or other creditors in the event of the liquidation or dissolution of the bank, and the absence of any condition or arrangement which would, in the opinion of BOB, diminish the value of any portion of the capital of the bank.

135 Banking Act, section 13(1) and Regulation 7(1).

136 Banking Act, section 13(2).

137 Banking Act, section 13(6).

138 Banking Act, section 16 and Regulation 8.

139 Banking Act, section 9(2).

140 Banking Act, section 9(4).

141 Banking Act, section 9(6) and (7).

- Controls of advertisement; and
- Appointments of board members and chief executive officer.¹⁴²

Financial Reporting and Anti-Money Laundering

Banks are in terms of the banking laws of Botswana obligated to ensure in terms of the Financial Intelligence Agency (FIA) that they have in place anti-money laundering policies, verify the identities of all individuals who carry out banking transactions, keep records of the aforementioned individuals identities, and report all suspicious transactions to the Financial Intelligence Agency.

A bank must implement an anti-money laundering program and will ensure that the staff of the bank is familiar with and complies with the program for the prevention of money laundering.¹⁴³ “Money laundering” means:

“ . . . where the conduct is of a natural person, failing, without reasonable excuse, to take steps to ascertain whether or not the property is derived or realized, directly or indirectly, from an unlawful activity, or where the conduct is of a bank, failing to implement or apply anti-money laundering measures and practices.”¹⁴⁴

The anti-money laundering program includes:

- Development of internal policies, procedures, and controls with due regard to the risks posed by money laundering;
- Establishment of “know your customer” procedures, which will include knowing the customer's names, business, establishing systems that would recognize suspicious activities and having in place internal suspicious reporting procedures;
- Appointment of a Money Laundering Reporting Officer;
- Establishment of a sound anti-money laundering compliance policy;
- Procedures to be followed by directors, principal officers, officers, and employees of a bank in the conduct of their business of the bank;
- Instructions given to directors, principal officers, officers, and employees of a bank on the prevention of the use of the bank for the purpose of engaging in activities of money laundering; and
- Training of directors, principal officers, officers, and employees of a bank to enable them to identify transactions that may relate to the commission of the offence of money laundering.¹⁴⁵

To give effect to the anti-money laundering program, a bank must report to BOB and the Financial Intelligence Agency any transaction involving large amounts

¹⁴² Banking Act, section 29.

¹⁴³ Regulations 4 and 17 of the Banking Regulations.

¹⁴⁴ Regulation 3 of the Banking Regulations.

¹⁴⁵ Regulation 17 of the Banking Regulations; FIA, sections 17 and 18.

of money or suspicious transactions by its customers.¹⁴⁶ “Suspicious transaction” means “a transaction which gives rise to a reasonable suspicion that it may involve financial offence, gives rise to a reasonable suspicion that it may involve property connected to, or to be used to finance terrorism, whether or not the property represent the proceeds of an offence, is made in circumstances of unusual or unjustified complexity, appears to have no economic justification or lawful objective, is made by or on behalf of a person whose identity has not been established to the satisfaction of the person with whom the transaction is made, or gives rise to suspicion for any other reason.”

For the purpose of making the aforementioned reports, a bank will designate an employee, at management level, as a money laundering reporting officer who will serve as a contact person on money laundering matters between the bank, BOB, and the Financial Intelligence Agency.¹⁴⁷

The anti-money laundering officer will be responsible for keeping a register of all reports made to him and will where necessary provide such reports to law enforcement agencies. Furthermore, a bank may not conclude a transaction with a customer unless it has taken steps to establish and verify the identity of the customer.¹⁴⁸ To establish the identity of a person, a bank must establish the following information:

- The person’s full name;
- The person’s nationality;
- The person’s date of birth;
- The *omang* or passport number;
- The person’s residential address or physical address;
- The person’s contact details; and
- The person’s occupation or source of income.¹⁴⁹

In addition, where a bank establishes a business relationship with a customer, the bank must maintain records of the identity of the customer and all transactions concluded by the customer for not less than five years from the date of the transaction.

146 Regulation 14 of the Banking Regulations.

147 Regulation 15 of the Banking Regulations.

148 Regulation 5 of the Banking Regulations and Regulation 10 of the Financial Intelligence Regulations.

149 Regulation 5, of the Financial Intelligence Regulations.

