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Louis F. Del Duca

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S. K. Date-Bah*

I. The Need for Collective Investment Schemes in Emerging African Markets

In the developed countries, there has in recent years been a great expansion of the investment capital mobilized by mutual funds and unit trusts. In many developing countries, particularly in Africa, the opportunities presented by the mechanism of collective investment schemes have not been seized upon adequately, if at all. There is a need to remedy this shortcoming.

Collective investment schemes generally have the following shared characteristics:

1. They involve a pooling of investors' contributions and, of course, any profits or losses;
2. Such pooled contributions are then invested in marketable assets, such as securities, futures, cash and property, rather than directly in the production process or the service sector;
3. Such schemes afford their participants, usually smaller investors, an opportunity to spread risk because they buy parts of a larger pool, which diversifies their investment.

Unit trusts, mutual funds and open-ended investment companies ("OEICs") share these characteristics. Because of these shared characteristics, they are useful investment vehicles to promote in developing countries wishing to mobilize the savings of small savers through products other than the traditional mechanism of deposits

* LL.B (Ghana); LL.M (Yale); Ph.D (London). Fellow of the Ghana Academy of Arts and Sciences. Special Adviser (Legal), Economic and Legal Advisory Services Division, Commonwealth Secretariat, London.

with commercial banks or building societies. Though unit trusts and OEICs are functionally equivalent, they differ in legal form. Unit trusts take the legal form of a trust while OEICs have a corporate form.

II. The Need to Regulate Collective Investment Schemes

Because collective investment schemes mobilize the savings of many people, many of them small savers, and because of the management of these pooled savings by others, it is prudent to put in place a framework of regulation to ensure that the managers of the pooled resources do not abuse their position. Although there is a need to encourage entrepreneurs in promoting collective investment schemes in African jurisdictions, such encouragement has to be carried out within a framework of regulation to ensure investment protection.

It is in this context that the Government of Uganda has been engaged in formulating legislation governing collective investment schemes. An examination of the Ugandan experience may provide some lessons on designing regulatory legislation that seeks to simplify precedents borrowed from developed countries, but which retains sufficient protection against abuse based on patterns already manifest in the developed markets, and which may be imitated by operators in emerging markets.

In Uganda, because of the historical connection with the United Kingdom ("U.K."), U.K. institutional and regulatory precedents were adopted and adapted to suit the circumstances of Uganda. These precedents will be reviewed below, but first the background to the proposed Ugandan legislation will be set forth.

III. Background to the Ugandan Experience in Formulating a Regulatory Framework for Collective Investment Schemes

In the early 1990s, The Government of Uganda decided to promote the development of its capital markets. This decision was part of Uganda's economic reform process to liberalize its markets. To this end, Uganda requested technical assistance from the Economic and Legal Advisory Services Division ("ELAS") of the Commonwealth Secretariat. Assistance was extended by ELAS, the first fruit of which was the enactment of the Capital Markets Authority Statute of 1995. Pursuant to this legislation, the Capital Markets Authority ("Authority") was established, and took on the role of actively promoting the development of the capital markets in Uganda. The Authority identified the mobilization of savings through collective investment schemes and the fashioning of a legal framework for facilitating this development as top priorities. The Authority made a further request to ELAS to assist it in developing legislation for this purpose. The legislative proposals discussed later in this paper are the result of cooperation between the Authority and ELAS. The Bill containing these proposals has been approved by the Cabinet of Uganda and has been placed before the Ugandan legislature.[1]

VI. Adaptation of Institutional and Regulatory Precedents From the English Jurisdiction

A. *Unit Trusts*

As already indicated, collective investment schemes take two broad forms: a company form and a contractual/trust form. Although functionally equivalent, these two legal forms are quite different. In the first, the investor buys shares in a company, which in turn invests in marketable assets such as securities, futures, cash or property. In the second, the investor contributes to a pool of funds, which is then invested. The receipt and investment of these funds will be governed by a contract between the investors and the manager of the fund. One of these contractual forms of collective investment schemes is the unit trust as it evolved in the U.K. Under this form, the contractual arrangement requires the manager to appoint a trustee to hold the scheme's assets and to protect the interests of investors by scrutinizing the manager's activities. The beneficial interest under the trust is divided into units held by the investors.

One of the traditional rules of English company law, which is by and large followed in Uganda, is that a limited liability company may not reduce its issued share capital. The policy underpinning this rule is that creditors of a company that has issued capital should not be prejudiced by the company reducing the capital that it has raised. A corollary of this rule is that a limited liability company cannot buy back its own shares since this would result in a reduction in its share capital. In England, the Companies Act of 1985 introduced some limited reform in this aspect of company law enabling companies to repurchase their own shares. This reform

1. The legislation was published as Bill No. 25 of 2000 in the Bills Supplement to the Uganda Gazette No.73 Volume XCIII dated December 15, 2000.

has not yet been adopted in Uganda. In any case, even in England, it remains true that shareholders cannot realize their investment by demanding that the company, whose shares they hold, repurchase them. Thus, the traditional limited liability company is not able to provide a ready market for its own shares. Such shares have to be traded on a stock exchange rather than sold back to the issuing company.

Trusts, in contrast, offer more flexibility on this score. They provide a mechanism through which investors can realize their investment by selling their investment back to the trustees. There was, and is, no rule preventing this. This flexibility accounts for the development of unit trusts rather than corporate mutual funds in the English jurisdiction as the mechanism for mobilizing the savings of small investors through collective investment schemes. In the U.S., where investment companies were allowed to repurchase their own shares, the development of unit trusts was unnecessary. There, open-ended investment companies or mutual funds evolved to play the same role as unit trusts.

Since a unit trust is not a company, it is not subject to regulation under the Companies Act. In Commonwealth jurisdictions, a company is usually prohibited from inviting subscriptions of money from the public unless it is a public company. A public company is then made subject to regulatory rules, such as the requirement to issue a prospectus, which are designed to give a measure of protection to the general public. Ugandan legislation seems to follow this pattern in the Companies Act of 1961 (Cap. 85), which provides in section 40(3) that it shall be unlawful for any company to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus that complies with the requirements of the section. Section 30 also provides that a private company must, by its articles of association, prohibit any invitation to the public to subscribe for any shares or debentures of the company. Without dedicated legislation, a unit trust could escape this regulation of its access to the public to raise capital for investment. Accordingly, in England, regulatory control over unit trusts was established initially under the Prevention of Fraud (Investment) Act of 1939, subsequently replaced by the Prevention of Fraud (Investments) Act of 1958. This in turn was repealed by the Financial Services Act of 1986, which brought in a new regulatory regime for unit trusts and other collective investment schemes (principally foreign schemes recognized in England).

For Uganda, the moral of the English legal evolution is that it is prudent to regulate unit trusts. Therefore, dedicated legislation is needed to regulate this flexible investment vehicle.

Under the Prevention of Fraud (Investments) Act of 1958, the Department of Trade and Industry ("DTI") of the U.K. Government interpreted the Act as preventing it from authorizing a unit trust to invest in anything other than "securities" as defined in the Act. It was not until the reforms enacted as part of the Financial Services Act of 1986 that unit trusts in England have been able to invest in a wider range of property.

The Capital Markets Authority of Uganda has prepared draft regulations in anticipation of the enactment of the collective investment schemes legislation. These regulations, like those cautious regulations developed initially by the DTI, authorize unit trusts to invest in securities and money market unit trusts only, and umbrella funds comprising such trusts.

B. Open-ended Investment Companies ("OEICs")

OEICs are defined in the Draft Ugandan Collective Investment Schemes Bill ("Bill") as: A collective investment scheme under which—

(a) the property in question belongs beneficially to and is managed by or on behalf of, a body corporate having as its purpose the investment of its funds with the aim of spreading risk and giving its members the benefit of the results of the management of those funds by or on behalf of that body; and

(b) the rights of the participants are represented by shares in or securities of that body which—

i. the participants are entitled to have redeemed or repurchased, or which . . . are redeemed or repurchased from them by, or out of funds provided by, that body; or

ii. the body ensures shares can be sold by the participants on an investment exchange at a price related to the value of the property to which they relate.

OEICs are thus mutual funds on the U.S. model that could not be established in English and most Commonwealth jurisdictions because of the rule that a limited liability company cannot purchase its own shares. In the U.S., where this strict rule has not prevailed, the corporate alternative to unit trusts described in the definition, *supra*, has become well established. The separation between the managers of the scheme property and the custodians of that property, which is an essential feature of unit trust schemes, is not an essential prerequisite of an OEIC or mutual fund since the scheme property is vested in the company and the company itself may manage that property, unless otherwise required by law.

In the Open-ended Investment Companies (Investment Companies with Variable Capital) Regulations of 1996, which became effective on January 6, 1997, the U.K. adopted a particular type of OEIC that, in fact, imported the separation between managers and custodians of the scheme property. Policy makers in the U.K., presumably impressed by the efficiency of the indirect regulation inherent in unit trust schemes, borrowed an analogous regime for OEICs that may now be established in England. Under the unit trust system, as we have already noted, a trustee is appointed who must meet certain standards. It is the trustee, rather than a regulatory agency, who directly monitors the activities of the managers. Of course, both the managers and trustees are ultimately subject to the regulatory authority of the Government, but the primary responsibility for protecting investors by supervising the activities of the manager rests with the trustee rather than a government agency. Although this separation of managers from the custodians of the scheme property does not exist in the typical U.S. mutual fund, the English regulations require it. The scheme property, although owned by the OEIC, is held by a depositary. An independent manager, termed an Authorised Corporate Director ("ACD"), has responsibility for managing the scheme property under the broad supervision of the Board of Directors of the OEIC.

The type of OEIC provided for under the English regulations is called an "investment company with variable capital." Uganda has borrowed and adapted this investment vehicle in the Bill. In recommending appropriate draft legislation to the Government for consideration, the Capital Markets Authority considered two options: the first option, like that adopted by Ghana and Bermuda, was to modify the basic company legislation to enable the operation of mutual funds registered as companies under the general companies legislation.

In Ghana, the Companies Code of 1963 relaxed the very strict rules governing the conditions under which a normal limited liability company can buy back its own shares. In addition, it relaxed the normal rules governing public issuance of securities by mutual funds. Normally, a public company makes an issue of its shares at infrequent intervals by publishing a prospectus inviting subscriptions.

A mutual fund may also make an initial block issue, but like the units of a unit trust, its shares may normally be purchased at any time. The company meets demand for further shares by increasing the quantum of its underlying investments. The fund is closed only when the fund managers conclude that the fund is as large as they are prepared to handle. But even then the fund remains open-ended in the sense that the company may re-purchase its shares. The fund may re-sell shares that it has re-purchased. This implies that the prospectus provisions governing normal companies should be modified in relation to mutual fund companies.

Section 319 of the Ghana Companies Code authorizes the Registrar of Companies to publish an order in the Gazette declaring a body corporate fulfilling certain statutorily prescribed conditions as an authorised mutual fund. The order may also direct that, for as long as such body corporate remains an authorized mutual fund, certain specified provisions of the Companies Code "shall not have effect in relation to that body corporate or to invitations to the public to acquire or dispose of its shares or that any of such provisions shall have effect with such modifications as are specified in the order."

Under this approach, the Registrar can modify the general company law regime to suit the operational requirements of mutual funds. The Bermuda Companies Act of 1981 contains analogous provisions in the sense that Part XIIA of the Act deals with mutual fund companies and relaxes the application of the general company law regime to such companies by exempting mutual fund companies from specified sections of the Act.

The Capital Markets Authority ultimately recommended a second option. This second option is that of independent parallel legislation authorizing the establishment of a particular type of open-ended investment company, namely the investment company with variable capital. This option draws on the recent debate, practice, and legislation providing a special purpose corporate code for open-ended investment companies in the United Kingdom. The Capital Markets Authority recommended this course because it avoids the need for complicated amendments to the existing Companies Act, thus avoiding unforeseen consequences to the general law on companies. This approach enables the fashioning of a tailor-made regime responsive to the operational needs of open-ended investment schemes. In addition, because of the similar approach recently adopted in the U.K., Uganda can look to the English precedents and practice for guidance.

In the U.K., those intending to establish and operate open-ended investment companies persuaded the Treasury that a free-standing special purpose corporate code was superior to a plethora of amendments scattered all over the text of the Companies Act. The Capital Markets Authority believes that the Ugandan legislature will find this argument equally persuasive. Thus, the kind of OEIC regime proposed for Uganda takes account of Uganda's regulatory capacity in that it does not overload the Capital Markets Authority by replacing the indirect regulation that a depositary can provide with direct regulation by the Capital Markets Authority.

V. Overview of the Provisions in the Draft Collective Investment Schemes Bill[2]

A. Licensing

A system of licensing and recognition is at the heart of the regulatory regime for unit trusts and OEICs. Part II of the Bill imposes control on unlicensed persons and schemes. No person may establish or operate a collective investment scheme in Uganda unless that person is a licensed person and the scheme is either licensed or recognized. It is a criminal offence for any person to violate this prohibition. A "licensed" scheme is one established in Uganda pursuant to a license granted by the Capital Markets Authority under Part IV of the Bill. A "recognized" scheme is a foreign scheme that is recognised in accordance with the provisions of Part VI of the Bill.

The restrictions on unlicensed persons and schemes imposed by the Bill also extend to advertisements inviting persons to participate in licensed or recognised schemes. No person may issue or cause to be issued such advertisements, referred to in the Bill as "scheme advertisements," unless that person is a licensed person or a licensed person has approved the contents of the advertisement. The restrictions also extend to advice and solicitation. No person may advise or procure any other person to become a participant in a collective investment scheme, unless the scheme is licensed or recognized.

The role of the licensed person is very important in the regulatory regime for licensed and recognised schemes. The Bill provides for two types of licensed persons: first, persons granted

2. The Bill was published as the Collective Investment Schemes Bill 2000, Bill No. 25, in the Uganda Gazette No. 73 Volume XCIII dated December 15, 2000.

licenses by the Capital Markets Authority in respect of activities specified in the license; second, any "investment company with variable capital" (the statutory name given to a company incorporated by virtue of the Bill). The investment company with variable capital is, in effect, deemed to be licensed with respect to activities carried out in connection with or for the purposes of the collective investment scheme instituted by the company. Because the granting of a license to an open-ended investment company automatically results in the statutory incorporation of the company, the Bill quite logically provides that an investment company with variable capital is to be regarded as a licensed person, without any need for it to make a further license application.

The Bill specifies the process by which the Capital Markets Authority may grant or refuse a license application. Only banks, insurance companies and other financial institutions prescribed by the Capital Markets Authority may apply for a license as a trustee or depositary. When the Capital Markets Authority intends to refuse an application, it must give the applicant written notice stating reasons for its proposed action. A person receiving such notice has the right to require the Capital Markets Authority to refer the matter to the High Court for the exercise of the powers conferred on the High Court by Part XII of the Bill (discussed *infra*).

The Bill describes the procedure for licensing unit trust schemes and investment companies with variable capital, which are the only types of collective investment schemes that may be licensed under the Bill. The Capital Markets Authority has the responsibility for granting the relevant licenses. An application for a license must be accompanied by the scheme's formation documents: namely, a trust deed and scheme particulars in the case of a unit trust; and the instrument of incorporation and a prospectus in the case of investment companies with variable capital. These formation documents must comply with the requirements of the Bill.

As already mentioned, an investment company with variable capital becomes incorporated as soon as its license as an open-ended investment company becomes effective. The Capital Markets Authority sends a copy of the license to the Registrar of Companies as soon as practicable. The Registrar then forthwith registers the company's instrument of incorporation and details relating to the company, its directors and depositary.

The criteria to be applied by the Capital Markets Authority in granting or refusing licenses are spelled out in the Bill as follows:

1. In the case of an investment company, the company must have a depositary independent of the company, and in the

case of a unit trust scheme, the manager and the trustee must be independent of each other.

2. In the case of a unit trust, the manager and the trustee must each be a body corporate incorporated in Uganda with its registered or head office in Uganda and in the case of an investment company, the depositary must similarly be a body corporate incorporated in Uganda with its registered office or head office in Uganda.
3. In the case of an investment company, the company itself and its depositary must be licensed persons, while in relation to a unit trust, the manager and the trustee must be licensed persons. Although Clause 17 does not expressly state that an authorised corporate director or ACD should be a licensed person, it is implied from Clause that an ACD needs to be licensed since it is given an active role, under the legislative scheme proposed, to manage and operate OEICs.
4. The formation documents must comply with the requirements of Schedule 1 of the Bill.
5. The scheme must comply with the Regulations applicable to it.
6. The name of the investment company or of the unit trust scheme or of its manager must not be undesirable or misleading.
7. The aims of the scheme must be reasonably capable of being achieved.
8. The shareholders or unit holders must be entitled to have their shares or units redeemed or repurchased in accordance with the formation documents and the Regulations at a price related to the net value of the scheme property, or must be able to sell their shares or units on an exchange at a price not significantly different from that price.
9. In the case of an investment company with variable capital, the company must comply with the following requirements:
   a) the company must have at least one director;
   b) the directors of the company must be fit and proper persons to act as directors of the company;
   c) if the company has only one director, that director must be the authorised corporate director ("ACD");
   d) if the company has two or more directors, the combination of their experience and expertise must be such as is appropriate for the purposes of carrying on the business of the company;

e) the ACD has been appointed by the directors from among such of them as are bodies corporate and licensed persons and not prohibited by the Bill or the Regulations from acting in that capacity;

f) the depositary appointed by the company is independent of the directors of the company.

B. *First Line Supervision and Regulation by the Ttrustee and Depositary*

The proposed Ugandan regulatory regime for collective investment schemes maintains the separation of responsibility between the management of scheme property and responsibility for its custody. This important safeguard for investors is achieved through the trustee for unit trusts and the depositary for OEICs. The trustee has the duty of overseeing and supervising the manager and safeguarding the title to trust property. For OEICs, the depositary carries out this regulatory function in conjunction with the ACD. These two institutions bear the primary supervisory responsibility over collective investment schemes.

As to the duty of trustees, the draft Collective Investment Schemes (Unit Trust) Regulations, adapted by the Capital Markets Authority from an English precedent, provide as follows:

1. It is the duty of the trustee to take reasonable care to ensure—

    a. except in relation to Part 5 (which deals with the investment and borrowing powers of unit trusts), that the scheme is managed by the manager in accordance with regulation 7.01 (which spells out the duty of the manager to manage the scheme), and

    b. in relation to Part 5, that decisions about the constituents of the property of the scheme do not exceed the powers conferred on the manager.

2. The trustee must satisfy itself on reasonable grounds and on a continuous basis that the manager has maintained and is maintaining sufficient records and is adopting such procedures and methods for the calculation of prices at which units are issued and redeemed to ensure that those prices are within the limits for the time being prescribed by Part 4 above.

3. If the trustee is at any time not satisfied of any matter specified in paragraph 2, it must inform the Authority.

The depositary serves an equally important role in the regulatory regime for OEICs. As already noted, one of the criteria for the grant of licenses for collective investment schemes is that there be an operator and a depositary of an OEIC, each of whom acts independently.[3] The Bill provides that all the scheme property of an investment company with variable capital shall be entrusted to a depositary for safekeeping. Schedule 3 of the Bill makes provision for the appointment, retirement and certain rights of depositaries, and the Capital Markets Authority has power to establish the detailed duties of depositaries. These provisions on depositaries ensure that the successful regulatory techniques used for unit trusts, the separation of responsibility for the management of scheme property from responsibility for its custody, are imported into the regulation of OEICs.

The Draft Collective Investment Schemes (Open Ended Investment Companies) Regulations adopted by the Capital Markets Authority for promulgation in due course contains the following more detailed provision on the regulatory responsibility of a Depositary:

> 6.05 General duties of the depositary
>
> 1. It is the duty of the depositary to take reasonable care to ensure that—
>   a. the company is managed in accordance with—
>   (i) Part 4 of these regulations (relating to pricing and dealing);
>   (ii) Part 8 of these regulations (relating to income), and
>   (iii) Regulations 11.04 and 11.05 of these regulations (relating to the investment and borrowing powers and the income of umbrella companies),
>
>   and without infringement of any provision of the instrument of incorporation that relates to—
>   1. the initial offer or issue or cancellation or sale or redemption or pricing of shares;
>   2. the dilution levy;
>   3. the valuation of the scheme property;
>   4. accounting periods (including half-yearly accounting periods);
>   5. the calculation of income available for allocation;
>   6. the allocation, payment or retention of income; and

3. The Bill provides that an operator, in relation to an OEIC, means that OEIC itself.

7. unclaimed distributions;

b. decisions about the constituents of the scheme property do not cause an infringement of Part 5 of these regulations.

2. The depositary must satisfy itself on reasonable grounds and on a continuing basis that—
   a. the ACD is adopting procedures and methods which are appropriate to ensure that the price of a share is calculated for each valuation point in accordance with Part 4 of the regulations, and
   b. the ACD has maintained sufficient records to show compliance with Part 4.
3. The depositary, in the context of its role as such, must act solely in the interests of the shareholders.

6.06 Control by the depositary over the scheme property

1. The depositary shall be responsible for the safekeeping of all of the scheme property of the company (other than tangible movable property) entrusted to it and shall ensure that any of that scheme property in registered form shall, as soon as practicable, be registered in the name of the depositary, or subject to regulation 6.10, its nominee.
2. The depositary is responsible for the collection of any income due to be paid for the account of the company and shall hold and deal with any income so collected in accordance with these regulations.
3. The depositary must take all steps and execute all documents which are necessary to ensure that transactions properly entered into for the account of the company in accordance with Section A above are completed.
4. The depositary must keep such records as are necessary—
   a. to enable it to comply with these regulations, and
   b. to demonstrate that such compliance by it has been achieved.

Unlike the trustee, however, the depositary does not have exclusive private sector authority to oversee the activities of the ACD. The Board of Directors also has authority under the Corporate Code,[4] to oversee the activities of the ACD as permitted by the Capital Markets Authority regulations. Paragraph 1(4) of the Corporate Code provides as follows:

4. Appended to the Bill as Schedule 4.

(4) The business of a company shall be managed-
  (a) where the company has only one director, by that director; or
  (b) where a company has more than one director, by the directors but subject to any provision contained in scheme regulations as to the allocation between directors of responsibilities for the management of the company (including any provision there may be as to the allocation of such responsibility to one or more directors to the exclusion of others).

(5) Subject to the provisions of this Statute, scheme regulations and the company's instrument of incorporation, the directors of a company may exercise all the powers of the company.

The Draft Regulations adopted by the Capital Markets Authority propose that where there is more than one director of the company, only the ACD has competence to deal with compliance issues. However, in matters apart from compliance, such as strategy or marketing, the other directors have a right to oversee the activities of the ACD.

It has been said that where an investment company with variable capital has only one director, which must necessarily be an ACD, it is in effect a unit trust in a corporate wrapper because it is then very similar to a unit trust, which has no board. Where however, it has other directors, the Board of Directors retains the right of general oversight over the performance of the ACD. Indeed, under the proposed Regulations, the Board may remove the ACD from office, if not satisfied with his performance. The ACD's appointment can be terminated by a notice whose terms have been approved by a resolution of the Board of Directors. The Board thus maintains supervisory authority over the commercial performance of the ACD, although compliance issues are outside its authority.

VI. Regulations

Under the Bill, the Capital Markets Authority is authorised to regulate unit trusts and OEICs. The Authority is likely to regulate matters such as: how the prices of the product are to be calculated; minimum portfolio diversification requirements; the kinds of investments the schemes may invest in; the scope of borrowing, and so on. These Regulations, when promulgated after the enactment of the Bill, will constitute another element in the regulatory system established for collective investment schemes in Uganda. These Regulations are to be enforced, in the first instance, by the trustee and depositary, and ultimately by the Capital Markets Authority itself. I do not propose to discuss here the contents of the Regulations, but the existence of Regulations is an important link in the regulatory system proposed for collective investment schemes in Uganda.

In preparing an initial set of these Regulations, the Capital Markets Authority has endeavoured to treat the two investment vehicles (unit trusts and OEICs) in the same way as far as possible. Thus, what is being offered is a choice as to form and not as to the level of regulation. The regulatory burden should be equivalent for both forms of collective investment schemes. The purpose of the Regulations is to provide high business standards and adequate investor protection for both types of collective investment schemes.

A. *The Regulatory Role of the Corporate Code*

The Corporate Code appended to the Bill as Schedule 4 provides a free-standing corporate legal framework distinct from that provided by the Companies Act but which has many parallels to the Companies Act. The Companies Act has certain protections for investors that are conceptually imported into the Corporate Code for the benefit of investors in OEICs. Key protections for investors in limited liability companies registered under the Companies Act, such as limited liability, ability to invest without having to manage the business, ability to obtain information about the business, shareholder democracy, and ability to divest without residual obligations, are maintained in the Corporate Code.

The main features of the Corporate Code parallel those of the Companies Act. As under the Companies Act, in the formation of an OEIC, certain documents relating to the constitution of the OEIC (the instrument of incorporation) must be registered with the Registrar of Companies on incorporation (which is automatic once the Capital Markets Authority has approved an application to establish an OEIC). The Registrar holds the instrument of incorporation and the company's prospectus (and their updates) as a matter of public record.

The investment company with variable capital has disclosure requirements similar to a public company in Uganda, but probably a little more stringent. For instance, Part VI of the Code requires the directors to prepare annual and half-yearly reports. It defines the powers of directors and of shareholders.

The main differences between the Corporate Code and the Companies Act relate to the maintenance of capital and arrangements for corporate governance. An OEIC under the Code does not have to maintain share capital, as a company under the Companies Act must. Another key difference between an OEIC and a public company under the Companies Act is that the latter must have at least two directors and a secretary,[5] whereas an OEIC may have only one director. However, each director of an OEIC has to be approved by the Capital Markets Authority as fit and proper under the Bill before an OEIC scheme is licensed.[6]

B. *The Role in the Regulatory System of the Capital Markets Authority and the Courts*

As outlined thus far, the Capital Markets Authority is at the apex of the regulatory system. Although established under a different enactment,[7] the Bill has pressed the Authority into use, since unit trusts and OEICs will be operating in the Ugandan capital markets. The Authority has various powers under the Bill to make Regulations, to make orders, to grant licenses, to give approvals and to exercise the powers of intervention set out in Part IX of the Bill. The Capital Markets Authority has the responsibility for implementing the system provided for by the Bill and making it work in a way that suits the circumstances of Uganda.

An aggrieved party is entitled to refer certain decisions of the Capital Markets Authority to the High Court. The High Court thus plays a role as a forum for review of the decisions of the Capital Markets Authority on those particular issues. These issues include: a proposal by the Capital Markets Authority to refuse an application for a license; a proposal to suspend or withdraw a license granted under the Statute; a proposal to give a direction that a particular individual is not a fit and proper person to be employed in connection with a collective investment scheme; or a proposal to publish a statement that a licensed person has contravened a provision of the Statute. In all such cases, upon a reference to the High Court by the person aggrieved, the High Court is to investigate the case and make a report to the Capital Markets Authority stating what would, in its opinion, be the appropriate decision in the matter, and the reasons for that opinion. The

5. *See* sections 177 and 178 of the Companies Act.
6. *See* section 17(2)(b) of the Bill.
7. The Capital Markets Authority Statute of 1996.

Capital Markets Authority is then obliged to decide the matter forthwith in accordance with the report of the High Court.

Where the matter referred to the High Court is the refusal of an application, the High Court may report that the appropriate decision would be to grant or refuse the application. Where the matter referred to the High Court is any action of the Capital Markets Authority other than the refusal of an application, the High Court may report that the appropriate decision would be to affirm or deny the action taken or proposed to be taken by the Capital Markets Authority, or to take any other action that it could take under the provision in question, or to take instead or in addition any action that it could take by virtue of its powers of intervention spelled out in Part IX of the Statute. The High Court thus represents an integral part of the regulatory system of the Bill, quite apart from its traditional role alongside other courts, of enforcing the criminal sanctions embodied in the Statute.

VII. Any Lessons?

Clearly, originality is not the hallmark of the statutory provisions outlined above. But there is no need to re-invent the wheel. Rather, the principle that can be extrapolated from the Ugandan experience is that established and successful legal concepts and mechanisms that exist in developed markets can be adapted for use in emerging markets. The advantage of this course is that it takes account of the fact that in a globalised world it is not safe to assume that deviant behaviour in developed markets will be unknown to, or will not be imitated by, operators in emergent markets. In borrowing precedents from developed markets for emergent markets, what is important is that they are adapted to fit the circumstances of the country in question.

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