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Views and News on Matters Offshore

The Offshore Chameleon

Pope Alexander VI of Borgia was fond of giving his dinner guests roast pheasant served in a human skull in order to remind them of their mortality. It should not be necessary to go to those extremes to make people aware of the need to plan for the inevitable. I had a recent reminder myself. Just days before Charles Bishop, a suicidal 15 year-old, flew a Cessna aircraft into the 28th floor of the Bank of America building in the centre of Tampa, Florida, in January, I had been just a few floors higher a few days earlier in a similar corner office on the same side drinking coffee and admiring the distant view of the city. Wills are a good thing.

It is the unexpected which most of us take little account of, especially when we accumulate assets offshore, whether it be cash, stock market investments or a home. Daniel Webster's observation that the past at least is secure is a sentiment which needs to be borne in mind in the area of international financial planning. In these days of increasing litigation, however, very often the protection sought from a will is insufficient and a disposition which functions during a person's lifetime (such as a trust inter vivos) is more desirable. Despite a mixed reception from OECD governments, (highlighted in our September, 2001, issue), the offshore trust continues to thrive as one of the most important elements in the majority of offshore financial planning strategies. It is not just that it is so flexible, almost chameleon-like in its ability to adapt to any particular legal terrain, but it also has a heritage which can be traced back centuries. Thus it is ingrained in common law and provides a monumental body of legal precedent for application and recourse to when necessary.

In most offshore trust centres today the legislation is geared to smooth the establishment and management of trusts. Consequently, there is very little difference between the offshore centres and the choice might depend more on other factors such as the level of comfort and confidence one feels with a particular professional firm or bank which is, in any case, often a deciding factor in most offshore situations and it is one which has been written frequently about in past issues of the Offshore Pilot Quarterly.

When I was preparing a draft of the trust law for the British Overseas Territory of the Turks & Caicos Islands in 1989, I relied in large part upon an ample supply of offshore trust law precedents to frame its broad terms and then I worked some innovations into the provisions (see the article on Turks & Caicos trusts on our website). Importantly, there was no attempt made to codify the law of trusts, not employing a straight jacket when there is no need for one and although my bias is towards the Turks & Caicos Islands trust law, it does not stand head and shoulders above many other offshore trust laws – including Panama's – which are all viable alternatives. It will be discovered that the fundamentals will remain the same, regardless of an individual's jurisdictional preference.

The decision to take the trust route is the easy part. Getting a trust deed drafted which meets your requirements is another matter. There are some ground rules, the most important of which is to make sure that you get an expert with broad experience to help you. There is an argument that trusts are better settled by the client rather than being declared by third parties because by affixing his signature to the deed, the client is confirming his agreement to the settlement and acknowledging its terms. Then again, where a client wants no visible connection with the deed (which may be examined, for example, by third parties) a declaration of trust has its attractions. A popular type of trust is the express discretionary trust which is usually declared - as opposed to settled - by a third party on behalf of the individual or corporate party (settlor) wishing to place assets in trust. This method of creation does, of course, obscure the identity of the settlor and even where he is to be a beneficiary his name need not appear as a beneficiary in the deed either. The settlor's name can be added subsequently to the beneficial class and will be recorded in a separate deed of appointment. In such a trust the beneficiaries have no vested (fixed) right to any of the trust's assets and the trustee decides (either solely or in conjunction with others) which beneficiaries will benefit. It is, however, quite normal in such circumstances for the client to deliver a letter of wishes to the trustee indicating who should, including the conditions and amount, benefit from the trust. There is a tendency to include other matters in the letter of wishes and whilst there is no problem with that, it is important to ensure that the contents are brief and precise. Unless the wishes expressed are contrary to public interest, unreasonable or incapable of performance, there is little doubt that a professional trustee will comply, although he is under no legal obligation to do so. Letters of wishes can be cancelled or revised at any time, and can be very useful aids in keeping matters confidential. Unfortunately, their usage has been abused by the inexperienced and the concept has been debased by utilising them under conditions for which they were never intended. If you employ the services of a professional trustee, however, you will avoid the pitfalls.

Ahead of drafting the actual constitution of a trust, a series of questions will need to be answered and these broadly cover 7 essential areas:

1. The distribution of funds (discretionary or vested) and the powers granted to third parties.
2. The trustee's administrative powers as well as rights and duties.
3. The appointment or removal of trustees and the trustee's powers of delegation.
4. The trustee's personal relationship with the trust fund and the beneficiaries. One needs to be mindful of conflicts of interest (such as where the trustee may also serve as banker).
5. The choice of the proper law and jurisdiction, including changes to the proper law and place of administration. Today it is commonplace not to have the administration of a trust undertaken in the jurisdiction that provides the law of the trust. There can be several reasons for this, but two frequently crop up: it is perhaps considered prudent to locate the trust's records (administrative and accounting) in a place which affords superior laws of privacy, although not necessarily a better trust law, and, secondly, a particular trustee is preferred who happens not to be located in the jurisdiction which controls the law of the trust.
6. The duration, revocation and amendment of the trust. A decision has to be made as to whether or not the trust should be irrevocable. Often the answer hinges on the question of taxation, especially as to whether or not the gift of assets to the trust is to be absolute. Besides duration and revocation, consideration needs to be taken of changing circumstances, some of which can be unexpected. A power of

amendment could be included (the exercise of which, by whom and how, are matters to be addressed) so that part or all of the corpus, for example, can be transferred to a new or existing trust located elsewhere and with other trustees. Perhaps the mandated terms of investment can be altered under certain conditions.

7. Powers of investment (to be exercised solely by the trustee or together with other parties) and the style of investment, whether conservative or speculative, will have to be decided and then set down (but see item 6) in unambiguous terms in the deed.

Space allows only the general issues to be mentioned and each individual case will require, after an initial analysis has produced the trust deed's broad framework, a second careful review from which a final deed can perhaps be drafted. The process, of necessity, should be slow and measured and it is imperative that you avoid Espresso trusts. Espresso is an appropriate word to use because it means coffee that is prepared on the spur of the moment, the enjoyment of which is short-lived, usually just like the advantages of a hastily-prepared trust which has not been thought out fully.

Potatoes and Termites

Almost 484 years ago the original city of Panama was settled by the Spanish conquistador Pedro Arias de Avila. It was the first European settlement on the Pacific coast of the Americas and it had originally been a small indian village on the Bay of Panama. It became the capital of the colony called Castilla de Oro at that time and soon it was a very important centre for organising the transport of South American gold to Spain. In 1671, however, Sir Henry Morgan, the English pirate, attacked the old town and two years later a new town was established a short distance away and which became the present-day city of Panama.

These conquistadors, in their plundering of South America for gold, as well as silver, overlooked a natural resource which, as it turns out, yields a far greater lucrative haul which today is estimated to be worth over $100 billion per year. The humble potato, with its origins in the Andes, has been farmed for some 7,000 years, but not until 1573, when Pedro Arias de Avila's original settlement in Panama was a little over 50 years old, did it make its debut in Europe. The perception at the time, however, was that the potato, because it was a root vegetable, would encourage lust and spread maladies. So the Spanish continued to dig for only gold and silver rather than the potato, satisfying their lust for riches, battling the malady of greed and storing their treasure temporarily in Panama. Today Panama is more well known for the canal whose one entrance lies nearby its capital; it is a vital waterway, transporting wealth in the shape of cargo between continents.

The pirates have gone, but attacks from other quarters are being made, this time against the country's banking centre and its other offshore financial services. Privacy, like the potato, is now in great demand and has become a much sought-after prize. In Panama it is a commodity which has been prominently cultivated and fashioned for application in international affairs and where a leading regional banking centre has developed. Panama's trading history has instilled a degree of commercialism in the country's psyche which has made many of its home-grown offshore practitioners, including its bankers, very enterprising. The poet T.S. Elliot was a former banker in the City of London in the early part of the last century and once commented that "I am sojourning among the termites". Life would have been more exciting for him in Panama, I'm sure, but the country's enterprising spirit is being tested today as international pressure groups (some of which are duplicating their efforts) descend on the offshore world of finance determined to erode, in varying degrees, the benefits which have been enjoyed for several decades. The United States is throwing the spotlight on banking secrecy which aids terrorist activities; it is also determined to improve its capacity to locate the

worldwide income of its citizens (which includes resident-aliens). The European Union, on the other hand, has its own agenda: so-called harmful tax practices, information exchange and tracking its citizens deposits in offshore banks. Then behind the countries are the forums, funds and organizations. The Organisation for Economic Co-operation and Development is concerned with transparency of the offshore financial centres, exchange of information and "harmful" tax practices – although not low tax regimes. An offshoot of the OECD, the Financial Action Task Force, is concentrating its efforts on terrorist finances and money laundering practices both onshore and offshore. The United Nations, for its part, is focusing mainly on money laundering and the Financial Stability Forum (another OECD creation) is examining the threats to world financial stability emanating from offshore financial centres. Finally, there is the International Monetary Fund which has its sights set on both money laundering and the health of the world's economies. It is to be hoped that the IMF has more success with its money laundering efforts than it has had with its economic monitoring: before Argentina imploded it gave the view that although there was a short-term problem with fiscal management, Argentina did not have either a fundamental economic or currency problem. That Enronesque view was given within weeks of the country defaulting on its debt and becoming more famous for its tangled finances than its tango.

The business of offshore financial services has been turned into a battlefield by bureaucrats and the governmental bias in some countries against privacy today is reminiscent of the prejudice against the potato centuries ago. Let's hope that the hot potato which privacy has become does not suffer a fate similar to the root vegetable before its benefits are universally accepted.

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Engaging an offshore representative is an important decision and we advise all persons to seek appropriate legal and tax advice from professionals licensed to render such advice before making offshore commitments.

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