

# Considerations when establishing financial structures in offshore jurisdictions

Presented by Stuart Pryke

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*Fiduciary Legal*

5 North Court, Clevedon Road, Richmond, London TW1 2HS  
Tel: +44(0)7814 495366 Email: [stuart.pryke@fiduciarylegal.com](mailto:stuart.pryke@fiduciarylegal.com)  
Web: [www.fiduciarylegal.com](http://www.fiduciarylegal.com)

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## Considerations when setting up an offshore structure?

- Types of Structure
- Taxation issues
- Geographical convenience/ EU membership
- Quality of services, political stability
- Existing professional connections
- Client preferences

When setting up a financial structure in an offshore jurisdiction you will need to consider the following.

1. **What type of structure are you looking to set up?** – company, partnership, trust, foundation etc?

2. **Is the jurisdiction in question going to give you taxation advantages you need?** In some cases the structuring may be entirely tax driven. Perhaps the structuring will rely on specific double taxation treaties and therefore any structures used will be limited to those which are possible in the jurisdictions which are parties to such treaties.

There might be VAT issues for instance and therefore it might be necessary to use a jurisdiction which operates within EU Customs Union:

This rules out Gibraltar as a jurisdiction as although it is part of EU as it is not part of the EU Customs Union but it rules in Isle of Man which, although not part of the EU, has treaties with EU so that it part of EU customs union for all intents and purposes.

3. **Geographical convenience.** Can you or your client physically get to the jurisdiction if you need to. If you or the client will be sitting on the board of a company located in the offshore jurisdiction and need to attend board meetings – if you live in London it is a lot easier to get to Jersey than to the British Virgin Islands for instance.

**EU membership.** If the matter you are dealing with concerns business in, say America, then it doesn't particularly matter if the jurisdiction you are dealing with is part of the EU. However, if the structure involves doing business inside EU then choosing a jurisdiction which is within the EU may be very important.

The decision to site a structure within an EU jurisdiction may not be about tax, it might be about marketing. A good example is of this is UCITS funds which can only be established in a jurisdiction which is member of EU, hence Luxembourg, Gibraltar, Malta.

4. The **Political stability** of jurisdiction, the **quality of operatives** operating in the jurisdiction, and the **judicial capability** in the jurisdiction are all relevant considerations.

5. **Existing connections.** It is a fact of life that we all prefer to work with someone we know.

6. **Client own preferences.** Client's often have their own preferences for jurisdictions regardless of their suitability.

**NOTE:**

In this handout the following references have been used:

**"BOT"** means the British Overseas Territories of Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Turks and Caicos Islands, Gibraltar.

**"CD"** means the Crown Dependencies of Jersey, Guernsey and Isle of Man.

**"common law offshore jurisdictions"** means BOT, CD, St Kitts & Nevis and the Bahamas

Not all offshore jurisdictions are covered in this handout. The offshore jurisdictions considered are restricted to the common law offshore jurisdictions (as defined above), Luxembourg, Monaco, Panama, Malta and Liechtenstein. Switzerland is also mentioned. There is a particular focus on Jersey, Guernsey, BVI and the Cayman Islands.

This handout is not intended as a detailed guide to the laws and regulations and the political and judicial structures of the different jurisdictions considered. The facts and statistics stated are accurate to the best of the author's knowledge, however given the wide range of jurisdictions and topics discussed it is possible that there may be some errors. This handout should therefore be considered only as a general guide in relation to the issues that should be considered when setting up financial structures in the offshore jurisdictions considered. Any persons considering setting up a financial structure in an offshore jurisdiction should not rely on this document and should take appropriate professional advice.

## **Types of structure – Can the jurisdiction provide the structure you want ?**

- **Companies:-** limited, public, PCC etc
- **Partnerships:** – general, limited etc.
- **Trusts:-** private, charitable etc.
- **Foundations**

### **Structures available offshore:-**

- Companies:- limited, public, PCC etc
- Partnerships: – general, limited etc.
- Trusts:- private, charitable etc.
- Foundations

## Companies

### Types of company:-

- Limited liability company
- Company limited by guarantee
- Public company
- Protected cell company
- Incorporated cell company

### Companies – types available

**Private company limited by shares** – available in all offshore jurisdictions.

**Private company limited by guarantee** – like a limited company but no shareholders only guarantors as to the liability stated in the memorandum & articles of association. Used for not for profit organisations where corporate status is needed and there is generally no need to distribute profits through dividends. Available in most offshore jurisdictions.

**Public company** (generally differentiated from private company by need to file audited accounts with registrar of companies). Available in most offshore jurisdictions.

**Protected cell companies (PCC)**– more interesting vehicle – invented in Guernsey 1997, now also provided in Jersey Isle of Man. Also in Cayman and BVI where they are called (segregated portfolio companies), Bermuda where they are called segregated accounts companies (SAC's) and a number of other common law offshore jurisdictions. Within the EU offshore jurisdictions they are available in – Gibraltar, Malta, Luxembourg (SICAR regime *société d'investissement en capital à risqué*).

PCC principle:- assets and liabilities pertaining to groups of shareholders are effectively parcelled in separate cells. PCC legislation isolates the liabilities to third parties contracting or dealing with a particular cell of the company so that they attributable to and only enforceable against the assets of that cell.

The key point is that a PCC is single corporate structure which can handle different risks in an isolated way.

Uses: traditionally these were investment funds and captive insurance companies.

Now PCC's are also used in secured note programmes; Sharia compliant structures; joint ventures; and property holding structures.

Advantages : -

1. Only need to incorporate one company
2. Only have to apply for regulation of one company.
3. Only have to file a tax return for one company.

Ratings agencies have already rated a number of deals involving Jersey PCCs and ICCs.

Swiss Life established PCC pension fund in Luxembourg in late 2009.

There are many public investment funds and insurance captives which have been created as PCC's – White Rock captive owned by AON for instance.

**Incorporated Cell Companies (ICC)** – Like a PCC but each cell of an ICC is a company in its own right (albeit it is also as a cell of the ICC).

ICC's – Currently only available in Jersey, Guernsey and St Lucia.

Advantages:-

- Faster set-up and exit when compared to a wholly-owned subsidiary
- Risk gaps and exposures may be allowed within the ICC
- Easy conversion of an incorporated cell to a separate company, or from an existing company to an incorporated cell.
- More credible basis for contractual relationship between cells and for cells investing in shares in another cell in the same ICC.

## Partnerships

### Types of partnership:-

- General partnerships
- Limited partnerships
- Limited liability partnerships

**General partnership:-** not a legal entity in its own right, creature of common law – “relationship between one or more persons carrying on business together with a view to a profit”- exists in all offshore common law jurisdictions.

In Bermuda it is possible to elect to have a general partnership which has separate legal personality - enforceability will still be unlimited against individual partners.

**Limited Partnership:-** Essentially a type of common law partnership – exists in most common law offshore jurisdictions. A limited partnership is not a legal entity in its own right (although this can now be achieved in Bermuda and shortly in Jersey). Limited partnership consists of general partner and limited partners.

Limited partners - liability limited as set out in constitutive documents,

General Partner - liability unlimited.

Limited partnerships legislation in most of the main offshore jurisdictions is modern and well drafted.

There are generally limited public registration requirements for limited partnerships.

Jersey currently has plans to introduce an incorporated limited partnership.

**Limited liability partnership** – this is partnership which is a legal entity in its own right. Unlike a general partnership or limited partnership the partners are not personally liable. Limited liability partnerships are not widely available in offshore jurisdictions but they are certainly available in Jersey & Panama.

## Trusts and Foundations

- Private trust for beneficiaries
- Purpose Trust
- Charitable Trust
  
- Foundations

### Trusts – types of trusts

**Private trusts for beneficiaries:** - All common law offshore jurisdictions have legislation permitting the establishment of private trusts for beneficiaries. However, some general comments can be made as to the advantages of particular jurisdictions.

Cayman Islands & Bahamas arguably have particularly robust legislation in relation to asset protection trusts, as they have a particularly high threshold for setting aside trusts by aggrieved creditors of the settlor requiring proof of fraudulent intent on the part of the settlor.

Cayman Islands doesn't have statutory protection for trustees, limiting their liability to the net assets of the trusts in relation to claims by third parties in same way as Guernsey and Jersey. In Jersey and Guernsey third parties dealing with trustees in the knowledge that they are trustees have their recovery limited to net assets of the trust. Therefore with Cayman Islands trusts in contracts with third parties, the trustee needs to have effective limitation of liability clauses.

BVI, has the VISTA regime which consists of statutory provisions that the trustee need not enquire into the activities of a company underlying the trust. It might be argued that practically the same effect can be achieved in other jurisdictions by incorporating an effective "anti-bartlett" clauses into the trust instrument see *Bartlett –v- Barclays Bank Trust Company Limited* (1980) Ch 515. Nevertheless, VISTA trusts are widely used, particularly where the settlor (or those connected with him) wish to control the activities of a company underlying the trust without interference from the trustees.

With trusts governed by the law of Jersey and Guernsey it is not possible for the trustees to exclude liability for fraud, wilful misconduct or gross negligence. No such equivalent provisions exist relating to trusts established under the laws of the Cayman Islands, BVI and

the UK for instance, where liability can effectively be excluded for everything but fraud - Armitage v. Nurse [1997] 3 WLR 1046.

**Non-charitable Purpose Trusts:-** It is noteworthy that in the Cayman Islands and Guernsey the legislation relating to purpose trusts specifically states that the objects of just holding shares in a company is a valid purpose – Jersey trust’s legislation silent on the issue.

The sophistication of the legislation relating to default provisions for the enforcement of the trust is variable between jurisdictions. Cayman, Jersey and Guernsey have good legislation in this regard.

Another issue to look out for is whether the role of the enforcer’s duty is defined or not - Guernsey and Cayman Islands legislation, for instance, states that enforcer’s duty is usually fiduciary, Jersey legislation is silent on the issue.

**Charitable Trusts:-** Most offshore jurisdictions permit charitable trusts but they don’t usually have a Charities Commission or detailed charities legislation. As a result the generally accepted common law definition of a charity is applied in most common law offshore jurisdictions, see dicta of Lord MacNaghten in the 1891 case of Commissioners for Special Purposes of Income Tax v Pemsel, namely:

*"Charity in its legal sense comprises four principle divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."*

Failure to enforce a charitable trust offshore usually falls on the Attorney General of the jurisdiction concerned. Offshore jurisdictions are not geared up for regulating charities in the same way as in the UK and generally do have the resources or mandate to monitor charities in the same way as happens in the UK. The effective monitoring of the charity offshore is left to the conscience of charitable trustees. This is perhaps a general area where the law of common law offshore jurisdictions could do with an overhaul.

**Foundations:-** These are essentially a corporate entity which has legal personality. Usually a foundation has a board of directors (with Jersey foundations this is called a “council of members”) but it does much the same thing as a board of directors. Unlike a company, a foundation does not have shareholders. A foundation may generally have beneficiaries, charities or non-charitable purposes as its objects but it depends upon the jurisdiction. Jersey has a very modern and well drafted foundations law. A Jersey foundation is formed by a charter and regulations. The charter is a public document but there are limited requirements as to what must be stated in the charter (such as the foundation’s name, its objects, winding up provisions and amendment provisions). Details of beneficiaries and the detailed operation of the foundation can be in stated in the regulations which is not a public document.

Foundations are not widely available but are certainly available in the following forms in the following jurisdictions.

- (i) Panama Private Interest Foundations;
- (ii) Bahamas Foundations;
- (iii) Liechtenstein Stiftungs;
- (iv) Liechtenstein Anstalts;
- (v) St Kitts Foundations;
- (vi) Nevis Multiform Foundations; and
- (viii) Malta Private Foundations
- (ix) Jersey Foundations

## The tax angle

- Is the jurisdiction going to provide the tax benefits required?
- Case of *Laerstate BV v Revenue and Customs*

### The tax angle

This is a large and rapidly ‘moving’ topic and obviously depends of the residency of those persons whose interests one is seeking to protect when establishing a particular financial structure offshore. It goes without saying that it will be necessary to consider the type of tax against which relief is being sought, for instance income tax/corporation tax, capital gains tax, inheritance tax etc.

As far as UK tax is concerned there still seems to be plenty of tax planning taking place around double tax treaties and also for use with resident non-doms.

For instance schemes are currently being publically promoted for UK resident, non-doms who don’t want to pay the £30,000 charge involving the use of non-income producing offshore trusts as a means of a capital gains tax deferment vehicle. Schemes are also being marketed using offshore bonds funded by unremitted gains and income. For those who may become UK domiciled for IHT purposes, schemes have also been publically suggested that the bond could be held in an offshore trust to avoid IHT arising on the realisation of the bond.

With investment funds HMRC has issued recent proposals to ‘level the playing field’ with regard to the taxation of offshore investment funds. There are also proposals for reform of the taxation of Controlled Foreign Companies “CFC’s”

See website:

<http://www.hm->

[treasury.gov.uk/d/cfc\\_discussiondoc\\_260110.pdf?dm\\_i=BSA,3CS6,1CAVID,AGVY,1](http://www.hm-treasury.gov.uk/d/cfc_discussiondoc_260110.pdf?dm_i=BSA,3CS6,1CAVID,AGVY,1)

### Companies - *Laerstate case*

The case of *Laerstate BV v Revenue and Customs Commissioners* - First Tier Tribunal 11<sup>th</sup> August 2009 concerned a Dutch company the shares of which were owned by a Mr Bock who was a frequent visitor to the UK at the material time. Mr Brock was also initially a

director of the company along with another director who had no interest in the UK and did not visit it. The case is a useful reminder that, where non-UK residence of a company is desired:

(i) board meetings should be held regularly outside the UK, and strategic decision making should be reserved for, and occur only at, those meetings;

(ii) the board members should be provided with sufficient information to enable the meeting to make all necessary decisions;

(iii) evidence of the information provided, and of deliberation of the issues at the meeting, should be created and retained. Contemporaneous rather than pre-prepared board minutes are preferable; and

(iv) directors and other influential personnel must conduct their activities in relation to the company in a manner consistent with these principles, especially when in the UK.

It is worth noting that, in order for a company to be non-UK resident for tax purposes, it is strongly advisable for all or at least a majority of directors to be non-UK resident, and for non-UK resident directors to have appropriate expertise. Participation in meetings by telephone from within the UK should be avoided, and physical attendance at the offshore meeting should be the normal procedure.

## Geographical convenience

- What involvement will there be between the client/the client's advisers and the offshore structure?
- Will the structure be administered in the jurisdiction where it is established or elsewhere?

### The Geographical question?

#### Client Involvement

Is structure to be run remotely or will it involve client and his advisers?

##### Example 1

You have an investment adviser (promoter), Mr S, resident in London and he wants to set up alternative investment fund. For tax reasons he wants to set up the fund offshore in a non-EU jurisdiction and for flexibility of the investment funds legislation he has chosen the Cayman Islands to set up his fund. In order to ensure the fund is not tax resident in the UK it will need Cayman Islands resident (or at least offshore) directors and it maybe that Mr S is quite happy to have Cayman resident directors who are unknown to him. Mr S may link himself with the structure in the fund prospectus (i.e. marketing documentation) by (say) calling the company in Cayman "The Mr S Alternative Investment Fund" and being named in the prospectus as the investment adviser to fund. However, it may be that, from a marketing perspective to key investors, this level of involvement with the company for Mr S is not sufficient and Mr S needs to be a director of the company as well as being its investment adviser. In this case a Cayman Islands company is unlikely to be ideal as it will be practically difficult for him to attend board meetings and (in light of the Laerstate case) having board meeting by telephone conference is not ideal. In these circumstances Mr S might look to (say) Guernsey or Jersey to set up his fund.

##### Example 2

A Swiss national based in London is keen to set up a family trust in Bermuda because they have heard it is a good place to have a trust because of the political stability and because it is a well established trust jurisdiction with well recognised trust laws. It is a common situation for an offshore trust to hold shares in underlying company which in turns holds the family assets. It maybe that it is appropriate for the trust and company to be run entirely by a professional trust company based in Bermuda. But what if the family's business involves actively trading within the EU? Or what if a family member wants to sit on the board of the underlying company? In this situation it might perhaps be best if an underlying Isle of Man

company were used for ease of travel for board meetings and because of IOM's VAT arrangements with the EU. Practically speaking the trust would probably also be administered from IOM and be governed IOM law but there is no reason why the trust could not be governed by Bermuda law and administered from IOM or Bermuda if required.

## **Administration**

As in Example 2 above, even if trust is to be governed by law of a particular jurisdiction, or (say) a company or general partner of a limited partnership is established in a particular jurisdiction; it doesn't follow that the trust, company or general partner must be administered from that jurisdiction.

For example although Switzerland and Italy are signatories to the Hague Convention on the Law Applicable to Trusts and Their Recognition. Switzerland itself doesn't have a trust law as such. Therefore any trust which is established and administered in Switzerland or Italy will, most likely, be governed by foreign law (commonly UK, Jersey, Guernsey, Cayman and BVI etc).

Likewise among offshore jurisdictions themselves, there are plenty of companies which are incorporated in one offshore jurisdiction but are administered entirely in another. This usually works fine between offshore jurisdictions themselves because there are usually no tax consequences as the companies involved are tax exempt. Thus, if there is something about Bermudian company law which appeals to the set up of your company (say) but you have a relationship with an administrator in Guernsey who you would prefer to use (say); then, providing you are happy for your Bermuda company to potentially be tax resident in Guernsey there is no problem with the Bermudian company being administered entirely from Guernsey, with Guernsey directors. It is particularly common, for example, for Guernsey, Jersey and Swiss trust companies to administer trusts which are governed by BVI law because of the appeal of VISTA trust regime in BVI.

The position is more problematic when the administration of a structure is brought onshore because of the obvious tax consequences. Although this still does frequently happen in the hedge fund industry for instance, as Cayman Islands hedge funds are frequently administered in Dublin (although of course one might argue that Ireland is an offshore jurisdiction itself).

## Other considerations

- Confidentiality
- Is there a requirement that the structure be situated inside or outside the EU?
- Trusts – consider Hague convention.
- Migration of companies/foundations between jurisdictions

### **Other considerations when setting up an offshore structure:**

- Confidentiality.
- Is there a requirement that the structure be situated inside or outside the EU?
- Trusts – consider the Hague Convention on the Law Applicable to Trusts and on their Recognition.
- Migration of companies/foundations between jurisdictions.

- **Confidentiality** – Depends on structure. Private trusts, limited partnerships – highly confidential. Companies, limited liability partnerships and foundations – often some degree of disclosure but minimal.
- **Consider TIEA issues.**
- **EU issues** - Is there a requirement that the structure be situated inside or outside the EU?

### **Confidentiality**

Trusts, companies, partnerships, foundations:- what do you have to file with regulator if anything and what is discloseable to the public? With trusts and limited partnerships there are often limited or no filing requirements and, even if there are, the information is generally not publically available. The general exception to this is in the case of unit trusts and limited partnerships which operate as investment funds, in which case there may be considerable filing requirements. With companies and limited liability partnerships the disclosure requirements are usually greater, although the information available to the public is often very limited and includes (in the case of companies) only details of the directors, shareholders and registered office. The accounts of a company are generally not publically available. Again, filing requirements may be considerable if a company is operating as an investment fund.

With confidentiality laws, to some extent the 'old rulebook' has been torn up. Actions such as that of the US Government against UBS bank in Switzerland in relation to the disclosure of banking details concerning US citizens and HMRC's action against Barclays Bank in Guernsey for disclosure of certain account holder's details, has brought the whole issue of confidentiality in the offshore industry into question. Offshore jurisdictions are signing Tax Information Exchange Agreements (TIEA) as fast as they can in order to avoid OECD blacklisting. In the Cayman Islands for instance where confidentiality is highly prized the Confidential Relationships Preservation Law has been 'watered down' slightly, although it remains a robust piece of legislation. As a result, it is difficult to argue that confidentiality is any more legally protected offshore than it is onshore. However, given that the offshore industry has historically succeeded to some extent because of its reputed confidentiality, it might perhaps be reasonable to suggest that offshore jurisdictions will remain highly conscious of their duties of confidentiality to their clients and will continue to robustly defend their client's interests unless they are forced to do otherwise by domestic legislation or through Court action.

## **EU**

A number of so called 'offshore' jurisdictions are full members of the European Union and therefore subject to the same EU directives as UK. Most well known are Gibraltar, Cyprus, Malta & Luxembourg although Gibraltar is outside the EU customs union.

The EU issue is probably more pertinent in the case of companies and investment funds than say private trusts. A classic example of where a person might want to use an EU offshore jurisdiction is in the case of investment funds which need to qualify under the UCITS Directives (Undertaking for Collective Investment in Transferable Securities). The UCITS Directive allows funds which are registered in accordance with the Directive in one member state to be freely marketed in all other member states.

In the case of private client business, the most likely need for setting up trusts and underlying companies or partnerships in an EU offshore jurisdiction would be where there was some trading requirement of the underlying company within the EU itself but company needs to operate in a low tax environment.

On the subject of trading within the EU, Isle of Man is not part of the European Union but it has a special limited relationship with the EU set out in Protocol 3 to the United Kingdom's Treaty of Accession.

Under Protocol 3, the Isle of Man is part of the customs territory of the European Union. It follows that there is free movement of industrial and agricultural goods in trade between the IOM and the Union. The IOM neither contributes to, nor receives, funds of the European Union, thus guaranteeing the IOM's fiscal independence. Any proposal to change Protocol 3 would require the unanimous approval of all Member States of the Union, including, of course, the UK.

- **Trusts – consider Hague Convention on Trusts**

Key Articles:- 6,7,8 concern relevant laws governing trust.

Consider forced heirship issues.

- **Migration of companies/foundations between jurisdictions – might this be helpful in the future?**

### **Hague convention**

See following website for details on the current status of and signatories to the Hague Convention of the Law applicable to Trusts and to their Recognition.

[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=59](http://www.hcch.net/index_en.php?act=conventions.text&cid=59)

Most of the major offshore jurisdictions are signatories to Hague Convention on Trusts including:-

Jersey, Guernsey (but not Alderney and Sark), Luxembourg, BVI, Switzerland, Monaco, Liechtenstein, BVI, Isle of Man, Cyprus, Malta.

Cayman, Bahamas and Singapore are notably, however, not signatories to the Hague Convention on Trusts

### **Key Articles of the Hague Convention on Trusts are as follows:-**

Article 6 :-

This provides that a trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case. Where the law chosen does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

Article 7:-

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected. In ascertaining the law with which a trust is most closely connected reference shall be made in particular to -

a) the place of administration of the trust designated by the settlor;

b) the situs of the assets of the trust;

c) the place of residence or business of the trustee;

d) the objects of the trust and the places where they are to be fulfilled.

Article 8:-

The law specified by Articles 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.

In particular that law shall govern -

- a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
- b) the rights and duties of trustees among themselves;
- c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
- d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
- e) the powers of investment of trustees;
- f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;
- g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
- h) the variation or termination of the trust;
- i) the distribution of the trust assets;
- j) the duty of trustees to account for their administration.

**Why hasn't Cayman and Bahamas signed the Convention?** The arguments put forward by Bahamas and Cayman are as approximately as follows

(i) Article 4, has no application to any threshold issue that may arise as to whether the settlor had the capacity to create the trust. Ratifying states have therefore had to provide for this separately in their trust legislation or, alternatively, have to rely on pre-existing conflict-of-law principles. The reality is that these issues have largely been dealt with in the trusts legislation of most offshore jurisdictions.

(ii) Issues as to the validity of transfers of property into the trust are also not covered by the Convention, again with the result that, jurisdictions that are bound by the Hague Convention would have to deal with this issue either statutorily or by reference to pre-existing conflict-principles. Again the reality is that these issues have largely been dealt with in the trusts legislation of most offshore jurisdictions.

(iii) Thirdly and fundamentally, The Convention, by Article. 15 expressly requires subscribing states to honour "*succession rights, testate and intestate, especially infeasible shares of spouses and relatives*". This, certainly seems to be a reference to forced heirship rights and the succession laws that frame them. In the circumstances this does seem to be the one area where there potentially could be a conflict between domestic anti-forced heirship legislation in the jurisdiction concerned and the Hague Convention on Trusts.

Professor Hayton's view as to the conflict issue mentioned in (iii) above is that, providing the trust is established inter vivos, then the only issue is whether the transfer of the property was valid under the lex situs. If it was valid transfer into the trust and the trust is valid under the proper law governing it, then the trust has validly come into effect and cannot be later impugned under the Convention. Tempting though this argument is, it does rather seem to simplistically dismiss the apparently clear intent of Article 15. Thus where forced heirship

issues are potentially involved, there might be a case for using a jurisdiction which is not a signatory to the Hague Convention of Trusts.

## **Migration companies/foundations**

Offshore jurisdictions often permit the migration (sometimes known as continuance) of companies (and foundations) in and out of their jurisdictions in a way which onshore jurisdictions do not. It is generally very effective. Thus, for instance, it is possible for a fully fledged and operational BVI registered company (say) with BVI directors to become a fully fledged and operational Jersey company (say) with Jersey directors without any break in its legal existence. It is not a merger or a transfer of assets – it is the legal continuance of the same company from one jurisdiction to another. The process of migrating a company or foundation is, however, quite labour intensive and bureaucratic and usually involves (in the case of a company) the following:-

1. Evidence that the company will be solvent both before immediately before and after migration.
2. Production of the new memorandum & articles of association for the new jurisdiction.
3. Proof as to the existing directors and as to who will be the directors after migration.
4. Lawyer's certificates from both jurisdictions that the company can legally be migrated in and out of the jurisdictions in question.
5. A sign off by lawyers in both jurisdictions that all statutory matters have been complied with.

Being able to migrate a company between jurisdictions could be quite 'handy', say, in case of PTC or a trading company underlying a trust. It would enable the PTC or underlying trading company to be moved to a new jurisdiction if the jurisdiction in which they were currently registered was no longer satisfactory or providing the benefits required.

## Quality of Service providers

- Captive insurance
- Open-ended funds – Hedge funds
- Closed-ended funds
- Vanilla companies.
- Trusts
- Foundations

### Quality of Service Providers

Another reason for choosing a particular offshore jurisdiction (and an important reason) is the quality of the service providers in the jurisdiction dealing with the area of business concerned. It is difficult to get reliable data relating to overall business activities in different offshore jurisdictions but it would seem reasonable to assume that a jurisdiction which carries out a lot of business in a particular area is likely to have a greater choice of service providers dealing with that area of business. In a very general way then, it might be reasonable to group activities in offshore jurisdictions into the following areas and make the following general comments.

#### Captive Insurance

The number of captive insurance companies in the leading offshore jurisdictions are Bermuda 958, Cayman 765, BVI 409, Guernsey 368, IOM 130, Jersey doesn't appear in the statistics considered [*Business Insurance Magazine 3.3.2008*].

Several offshore jurisdictions have lower capitalization requirements, which may allow captives to be set up with less initial investment and lower reserves. Offshore captive insurers also sometimes have lower tax rates on investment and underwriting income, which reduces expected tax payments relative to domestic captives.

#### Investment Funds

##### Hedge Funds

The Cayman Islands is home to the largest percentage of offshore-domiciled hedge funds, (over 9000 registered mutual funds) with an estimated 67% market share, followed by the British Virgin Islands with 11% and Bermuda with 7%, [*London-based International Financial Services London April 2009*]. It is difficult to find statistics as to the current total value of Cayman Island registered funds but it was well over £1.38 Trillion in 2007.

It should be borne in mind that hedge funds are not all established with massive amounts of capital. There are many hedge funds which are established by small investment advisory firms that are initially capitalised with only a few million pounds.

In very simplistic terms the Cayman Islands has dominated the hedge fund market to date because its regulatory system is very flexible and permits investment funds to be administered entirely from outside the Cayman Islands even where the minimum investment per investor is as low as US\$100,000 per investor.

## **Other open-ended and closed-ended funds**

Clearly because of their predominance in the investment funds market generally the Cayman Islands, the British Virgin Islands and Bermuda are favoured jurisdictions for all types of investment funds both closed-ended and open-ended. However, outside of the hedge fund market the Channel Islands is also a significant provider of services in the investment funds field. Recent changes to legislation relating to investment funds in both Jersey and Guernsey have also been aimed at also attracting the hedge funds market to these jurisdictions.

### **Channel Islands**

Jersey currently has registered funds valued at £163,029 Million. This comprises a total of 1,287 funds of which 638 were closed-ended and 649 were open-ended [*Jersey Financial Services Commission statistics 30<sup>th</sup> Sep 2009*].

Guernsey currently has registered funds valued at £132,555 Million. This comprises a total of 969 funds of which 685 are closed-ended schemes and 284 are open-ended schemes [*Guernsey Financial Services Commission statistics 30<sup>th</sup> Sep 2009*].

### **Isle of Man**

The Isle of Man now holds nearly 5% of all AIM (London Stock Exchange) listings and is the leading jurisdiction for such listings outside the United Kingdom, although according to IOM Financial Services Commission there are currently only 127 collective investment schemes registered in IOM. The country also leads other international business centres in the size of market capitalisation of non-United Kingdom AIM companies by country of registration.

### **Stock Exchange listing issues**

The Channel Islands has its own stock exchange as does the Cayman Islands and Bermuda. Some stock exchanges may have limits on type of funds they will list. So if you are establishing an investment fund and you need to list the shares (or interests) on a stock exchange you need to ensure that wherever you set up your investment fund vehicle you are able to list the shares (or interests) in that vehicle on the stock exchange in question.

### **Basic private companies**

Private companies limited by shares are vehicles which all offshore jurisdictions have the capability to deal with and it would not be appropriate to differentiate between jurisdictions in relation to the quality of service providers which set-up and administer basic companies.

### **Trusts**

With private trusts the position is much same as with basic companies. Most offshore jurisdictions have the capability to set-up and administer private trusts. In terms of the volume of trusts administered in different jurisdictions it is difficult to get any data because

there is generally no requirement to register details concerning private trusts in most offshore jurisdictions. However, if the quantity of reported litigation is anything to judge by in terms of market dominance, it would probably fair to say that Jersey, Guernsey, Bermuda, the Cayman Islands, the British Virgin Islands and the Isle of Man are the leading private trust jurisdictions within the common law offshore jurisdictions.

## **Foundations**

As foundations are only available in the following forms in the following jurisdictions, it is self-evident that experienced service providers in these fields are only likely to be found in these jurisdictions.

- (i) Panama Private Interest Foundations;
- (ii) Bahamas Foundations;
- (iii) Liechtenstein Stiftungs/Anstalts;
- (vi) St Kitts & Nevis Foundations;
- (viii) Malta Private Foundations
- (viii) Jersey Foundations

## Political stability and judicial reliability

- How politically stable is the jurisdiction?
- What is the quality of the judiciary?
- Is it possible to enforce foreign judgements in the jurisdiction?
- Is the jurisdiction well regulated?

### Political Stability

#### Offshore jurisdictions with a UK connection

British Overseas Territories:- Anguilla, Bermuda, BVI, Cayman Islands, Turks and Caicos Islands, Gibraltar. BOT's are sovereign territory of the UK, essentially they are remnants of British Empire which have not achieved independence.

Crown Dependencies: Jersey, Guernsey and Isle of Man. CD's are property of the Crown and are not independent sovereign nations. Constitutionally however, CD's are independent of the UK and have the power to pass their own legislation, subject only to the consent of the Crown.

BOTs are therefore essentially part of UK and, it seems will inevitably receive support financially and militarily from the UK should the need arise. By way of recent examples the UK imposed direct rule in Turks & Caicos in Aug 09 due to wide spread political corruption. In Oct 09 the UK government effectively guaranteed loans to the Cayman government so that it could pay its public administration staff.

#### St Kitts and Nevis

Known as the Federation of St Kitts and Nevis (or the Federation of St Christopher and Nevis) its system of governance is modelled on the Westminster Parliamentary System. It is an independent sovereign nation with the Queen as its head of state. However, the Federation has a very unique political structure. Although St. Kitts and Nevis is a Federation, there is an independent Nevis Island Government and an independent St. Kitts Island Government. Nevis therefore has its own unicameral legislature and its own island administration that has the authority to formulate economic policies.

#### Bahamas

The Bahamas is an independent sovereign nation. The politics of the Bahamas takes place in the framework of a parliamentary representative democratic monarchy, whereby the Prime Minister is the head of government, and of a multi-party system. The Bahamas is an independent country and

Commonwealth Realm. It is a parliamentary democracy whose political and legal traditions closely follow those of the United Kingdom. Executive power is exercised by the government.

### **Panama**

Panama is a presidential representative democracy. For every year since 1996 the World Bank has published a list of Worldwide Governance Indicators. Among the indicators of good governance measured, political stability is considered not only as an indicator of good governance but also a strong indicator of a nation's potential for economic growth and prosperity. Panama placed fourth in Latin America in terms of political stability but it lags behind Uruguay (1<sup>st</sup>), Costa Rica and Chile.

### **Luxembourg**

Luxembourg is a sovereign nation a member of EU and parliamentary representative democracy with a constitutional monarch. It is a member of the EU and NATO.

### **Liechtenstein**

Liechtenstein is a sovereign nation with multi-party parliamentary representative democratic monarchy.

### **Monaco**

Monaco is a sovereign nation with a constitutional monarchy. Monaco's military defence is, however, still the responsibility of France.

## **Judicial Quality**

### **The offshore Crown Dependencies and British Overseas Territories, Bahamas, St Kitts & Nevis**

For the offshore CD's and BOT's, the Bahamas, St Kitts & Nevis the ultimate court of appeal is to the Judicial Committee of the Privy Council, which is essentially what was the UK judicial House of Lords and is now the UK Supreme Court. All these jurisdictions pay homage (to a greater or lesser degree) to English Common Law. Whilst the quality of the judiciary and the judicial process varies between these different jurisdictions, it is probably fair to say that increasingly there is a comprehensive body of offshore law cases decided in these jurisdictions, particularly on trust matters, which are turned to as persuasive authority by the courts in all these jurisdictions and in the UK. The point being that, whilst the courts in each jurisdiction will necessarily apply their own legislation and laws to any particular case before them, the availability of comprehensive and quality law reports from different jurisdictions but on similar themes has led to a more consistent approach to the law throughout these jurisdictions than was, perhaps, previously the case.

### **Luxembourg**

Luxembourg has an independent judiciary. New administrative courts began operations in 1997, after a 1995 decision by the European Court of Human Rights that Luxembourg's Council of State could no longer serve as both a legislative advisory body and an administrative court.

### **Liechtenstein**

Liechtenstein has a judiciary which is separate from legislature and the executive but from 2003 the crown prince has the right to appoint the countries judges, which suggests that the judiciary might not be entirely independent.

## **Monaco**

Monaco has an independent judiciary but being such a small country it is difficult to imagine that it has the ability to deal comprehensively with complex cases.

## **Switzerland**

Switzerland has a sophisticated judicial system which is apparently efficient. However each canton has its own courts which apparently makes it difficult for there to be consistent judicial decisions throughout Switzerland. Apparently the tax treatment of trusts can be different at federal level and canton level.

## **Panama**

In Panama judicial authority rests with the Supreme Court which is composed of nine magistrates and nine alternates, all appointed by the president (subject to approval by the Legislative Assembly) for 10-year terms. The legal system is based on the civil law system.

## **Speed of Judicial decisions**

It is probably fair to say that none of the legal systems in the offshore jurisdictions mentioned quite match the UK for efficiency. Rules on costs and issues of 'proportionality' as found in the UK judicial system are not much in evidence offshore. That said, there does seem to be an increasing willingness of the judiciary in offshore jurisdictions to criticise local law firms in respect of ill thought out applications and case mismanagement. In years gone by, local lawyers in offshore jurisdictions were often virtually beyond public reproach, save in cases of serious misconduct.

## **Enforcement of foreign judgements**

Some jurisdictions have specific reciprocal enforcement statutes which allow judgements in a foreign jurisdiction to be registered in the offshore jurisdiction and vice versa. Not surprisingly, with regard to the BOT's and CD's, these laws often apply between the overseas territory and the UK. Usually, however, these reciprocal enforcement statutes only apply to final judgements for a monetary sum. In order for non-monetary judgements to be enforced in overseas territories it is normally necessary to rely on the common law doctrine of comity. However a foreign judgement will only be enforced under the doctrine of comity if the judgement is (i) final and conclusive in jurisdiction concerned (ii) not contrary to public policy and (iii) not contrary to the legislation of offshore jurisdiction relating to the enforcement of foreign judgements.

With regard to the enforcement of foreign judgements affecting trusts (be it monetary or non-monetary) in most offshore jurisdictions there is specific legislation in place which prevents the enforcement of foreign judgements under forced heirship laws, or which attempt to set aside or vary trusts governed by the law of the offshore jurisdiction. The recent case of Mubarak v Mubarak Jersey Royal Court 15<sup>th</sup> August 2009 (otherwise referred to as "The Matter of IMK Family Trust") concerned the enforcement in Jersey of an order of the English Court in a divorce case varying a Jersey trust. The Jersey Royal Court gave a robust judgement refusing to enforce the order of the English Court. There is little doubt that other offshore jurisdictions with similar trusts legislation will rely on the *Mubarak* case as persuasive authority in order to defend trusts governed by the law of their own jurisdictions from 'attack' by foreign judgments.

## Regulation

Financial regulation in offshore jurisdictions (once a byword for unnecessary 'inconvenience and delay') must now be regarded somewhat differently in light of the recent financial crisis. The more heavily regulated jurisdictions such as Jersey and Guernsey, have 'dined out' during the financial crisis on the European and US 'finger pointing' on both sides of the Atlantic aimed at other less regulated offshore jurisdictions, the Cayman Islands in particular. Thus, a heavily regulated offshore jurisdiction may now have particular attractions for clients who are nervous about financial stability in the less well regulated jurisdictions. In practice as far as the offshore BOT and CD's are concerned, it seems likely that, the question of whether a jurisdiction is heavily regulated or not, will not affect the financial stability of the jurisdiction in question as these factors are, it is submitted, ultimately governed by global financial events. From a marketing perspective, however, financial vehicles established in better regulated jurisdictions may, in certain circumstances, have an advantage over those that are not.

Regulators in offshore jurisdictions (as with other jurisdictions), by reason of their statutory mandate, don't work on ideological principles. The questions for regulators is generally not about whether the source of monies coming into the jurisdiction is morally acceptable or whether the financial vehicles established in their jurisdiction are treating their ultimate investors in a morally acceptable way; the question is whether the correct statutory 'boxes' have been ticked and whether the reputation of the jurisdiction is protected. Thus, providing the correct boxes are ticked and nobody's 'feathers' are likely to be publically 'ruffled', it is submitted that regulators are fairly unconcerned by what occurs in their jurisdiction.

It is no secret that Jersey and Guernsey have set their stalls out as being among the most highly regulated jurisdictions in the offshore industry. There is an advantage with higher levels of regulation in offshore jurisdictions, in that it is generally easier to 'know where you are' as far as the interpretation of regulatory statutes is concerned. With less well regulated offshore jurisdictions it is sometimes difficult to 'pin down' what the regulatory requirements are. This results in professionals being forced to submit application forms to regulators on behalf of their clients without being sure of the outcome.

In these circumstances the quality of the service provider you are dealing with in the jurisdiction concerned can make a difference. Offshore jurisdictions are, by their nature, very small in terms of population. Generally there are only a few regulatory personnel for each financial sector (trusts, funds, banking etc). Using a service provider which knows the regulators well and between whom there is a considerable degree of trust can have an advantage for clients.

It is almost impossible to distinguish between jurisdictions in terms of quality and levels of regulation. However, it is submitted that in order to get an idea of how well a jurisdiction is regulated it is not a bad idea to look at the regulator's website. I have set out the website of some of the main offshore regulators below.

Cayman – CIMA - <http://www.cimoney.com.ky/>  
Jersey Financial Services Commission - <http://www.jerseyfsc.org/>  
British Virgin Island Financial Services Commission - <http://www.bvifsc.vg/>  
Guernsey Financial Services Commission - <http://www.gfsc.gg/>  
Bermuda Monetary Authority - <http://www.bma.bm/>  
Isle of Man Financial Supervision Commission - <http://www.fsc.gov.im/>  
Gibraltar Financial Services Commission - <http://www.fsc.gi/fsc/>  
Luxembourg - Commission de Surveillance du Secteur Financier -  
<http://www.cssf.lu/index.php?&L=1>  
Nevis Financial Services Department - [www.nevisfinance.com](http://www.nevisfinance.com)