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OFFSHORE PILOT QUARTERLY

Commentary on Matters Offshore

December, 2005

Volume 8

Number 4

Reflections

This issue marks the 8th anniversary of the Offshore Pilot Quarterly and I would venture to suggest that anyone seeking an introduction to the world of offshore financial services (with insight into some of the quirks and contradictions that are an essential part of it) will find an ample source of information in the back issues of the OPQ. The challenge has often been to present a generally dull subject in such a way as to make it a little lighter and brighter. It is, after all, one that has the ability to even make accountants and actuaries yawn. Each year the OPQ has covered a wide range of issues, some of which have been recurring themes such as the combined efforts of the European Union and the Organisation for Economic Co-operation and Development to curb many of the activities of the offshore financial services centres. Other topics have included how to choose the right professionals and avoid the swindlers, regulatory and supervisory issues, the emergence and the future of offshore centres, money laundering, trusts, trustees and trust companies, succession planning, asset protection, bearer shares, tax evasion and banking secrecy. Inaccurate reporting, which can muddy the offshore waters, has been mentioned in the past also and recently we contributed to that. The September issue, when commenting on political expediency, should not have placed the London statues of King Charles I and Oliver Cromwell in King Charles Street. They are in the adjoining broad thoroughfare of Whitehall with Cromwell at one end and Charles at the other. Whitehall, in fact, has become synonymous with central government in Britain because of the large number of government

offices located there. Some might say that the statues, with expediency in mind, serve as appropriate symbolic book-ends for all the bureaucracy wedged between them.

The very first OPQ issue concentrated on Panama as an offshore centre and so will this one. In the past eight years the progress made in raising Panama's profile as an offshore centre has been remarkable. Controls and supervision have been significantly strengthened but perhaps the most progress has been made in the area of banking. Maximilien Robespierre said that when a banker jumps out of a window, jump after him because that's where the money is. But in Panama such a banker is probably trying to escape from an angry mob who have been trying to get their bank accounts opened. The process can be arduous and reflects the profound changes which have taken place since the laissez faire days of twenty years ago. Government has imposed stringent rules regarding the due diligence required of banks and, indeed, trust companies.

As long ago as 2001 the International Monetary Fund recognised that reality was a far cry from the perception that many people had about the country's banking standards and it is worth noting what the IMF said at the time: "The legal and regulatory requirements are strict and many requirements exceed those in place in industrial countries ... the level of supervision dedicated to anti-money laundering is exceptional and under different circumstances disproportionate relative to the risk posed by money laundering". I can see more local bank managers moving to ground floor offices if they have windows.



Magicians and Promises

Although trusts and foundations can open bank accounts, own real estate and manage investment accounts, many people want their testamentary affairs (which is what trusts and foundations deal with) to be as private as possible. They prefer to submit company paperwork rather than foundation and trust information. After all, practically every business or contractual relationship, bar marriage, can be entered into by companies. But unless you will be personally taking charge, the service provider representing your company needs to have both the experience and the qualifications that will enable your best interests to be served. Here I would add that the business of managing offshore companies in Panama should be subject to more regulation unless it is being undertaken by professionals such as law, accountancy or trust firms.

Bearing in mind that the offshore company is usually central to most offshore business plans, the quality of administration can be very important. All too often the unsuspecting and unknowing client is assured that no problem is insurmountable by the questionably-qualified company manager. A client might think that the agent really is a magician who can produce a rabbit from a hat, but the reality, of course, is often the opposite. The experience can prove both costly as well as counter-productive for the disillusioned client.

Speaking of rabbits, the president of the United States, so the story goes, had his own way of determining professional ability. Instead of pulling rabbits out of hats, however, he wished them to be brought out of forests. Constant rivalry between the Central Intelligence Agency, the Federal Bureau of Investigation and the Los Angeles Police Department as to which of them was the best at catching criminals had worn the president down and so he charged each of them with the task of finding a rabbit after it had been released in a forest. The first to find the rabbit was clearly the most competent. The CIA operatives went into their forest, placed animal informants all over the place and questioned all plant and mineral witnesses. After three months no rabbit had been found and the CIA concluded that rabbits don't exist. The FBI, on the other hand, were frustrated after 2

weeks without any leads on the rabbit and burned the forest to the ground, killing everything in it, including the rabbit. They made no apologies, arguing that the rabbit had it coming. The LAPD, however, only took two hours before officers emerged from the forest with a badly beaten bear yelling at the top of its voice: "OK, OK, I'm a rabbit!" In business generally, similar claims of excellence are continually made and it can become difficult for the inexperienced visitor to foreign shores to see the forest for the trees (let alone try and find any rabbits).

Before even venturing offshore, it is wise to make certain that there will be no adverse consequences onshore. Don't unwittingly set a bear trap (apologies to the LAPD) that might snap shut at a later date and from which you cannot free yourself. Good offshore professionals will remind you of this whereas others might emulate the CIA in the story and opt for total denial. They will say that no problems exist. Others may be like the FBI in the story and take a reckless, ill-considered approach which ultimately destroys their client's entire offshore structure. Then there are the one-size-fits-all merchants of mendacity who are determined to take on the business regardless of the outcome for the client. They are likely to call a bear a rabbit if they have to.

Such service providers, it must be said, will always find business thanks not only to the foolish but the frugal. It can be dangerous when costs, rather than competence, become the overriding concern. I am reminded of the story about the mother accompanied by her children going into a butcher's shop during the Great Depression in America. She asked for a sheep's head and added "please leave the legs on it". Something for nothing is as rare offshore as it is onshore. Don't be one of those people who, to quote Oscar Wilde, "know the price of everything and the value of nothing". He was referring to cynics but it has equal application in this instance. I am not advocating the use of overpriced professionals – and there is certainly an abundance of them also – but I am reminding readers that sometimes parsimony and prudence do not go together.



Superstars and Cinderellas

“Uncertainty and expectation are the joys of life”. So said William Congreve, the 17th century playwright. My tendency in offshore matters is to dwell more on the pleasures of expectation and avoid, as far as possible, the perils of uncertainty. This brings us to Panama’s trust and foundation laws. Banking and offshore companies have been the superstars of Panama’s offshore services whereas in the past trusts and foundations have taken on the role of Cinderella. This is changing as strategies become increasingly sophisticated.

Panama’s trust legislation was originally enacted back in the 1940s and was based on the common law trust. In 1984 more modern and flexible legislation was introduced. A trust today can be established for any lawful purpose and execution of the trust deed can remain private unless real estate in Panama forms part of the corpus when the trust’s existence must be recorded at the Public Registry. Nonetheless, the trust deed must be executed by both its creator and the trustee before a notary public. The trust falls within the ambit of the privacy protection given to other financial services in Panama; trustees (including, where appropriate, their employees) are bound by strict confidentiality and breaches can mean both prison sentences and substantial fines. Settlers, trustees and beneficiaries can be companies rather than individuals if such arrangements will be conducive and even although the trust is managed in Panama, the law governing its administration can be that of another jurisdiction. Trusts created under a foreign law can, if permitted, adopt Panamanian law (but the formalities applicable to Panamanian trusts must first be complied with). In all other material respects Panamanian trusts are indistinguishable from those of most jurisdictions, even if they are governed by civil law and not common law.

The foundation law in Panama, however, is far more recent, having been passed in 1995. What is the difference between a trust and a Panamanian foundation? This question is frequently asked. I often respond by saying that the foundation suffers from an identity crisis because it thinks like a trust but has the personality of a company except that instead of having shareholders, it has beneficiaries. It cannot, however, conduct commercial activities

in its own name and normally uses a company which it controls 100% for such purposes. Being a fiduciary arrangement, it is very similar to a trust, having a founder (settlor), charter and regulations (trust deed), foundation council (trustee) and beneficiaries. Like the Panamanian company and trust, certain of the foundation’s activities can be kept confidential. Although the charter is required to be recorded at the Public Registry, the accompanying regulations (detailing such matters as information about beneficiaries, benefits and the main powers given to either the foundation council or other parties) are not. Once the charter is registered, the foundation in Panama takes on the complexion of a corporate body.

The only details regarding the foundation which cannot be confined to the private regulations, and which will appear on the Public Registry records, are the name of the foundation, its place of domicile, details of the initial corpus (must be a minimum of US\$10,000 in whatever currency chosen), the names and addresses of foundation council members (either 3 individuals or one or more corporations), details of the local Registered Agent (must be either a lawyer or law firm in Panama), the objectives (including the general, but not specific, application of assets), its duration (can be perpetual), how (but not their names) beneficiaries are selected, confirmation that the charter can be modified and, finally, the manner in which liquidation of the foundation is to be dealt with in the event of dissolution.

By switching foundation council members for directors and noting many other similarities, it is easy to see how the Panamanian foundation has a DNA similar to a company but is readily identifiable with a trust also. Panamanian foundations have become increasingly popular but, just like the business of managing offshore companies, the issue of supervision arises. If professional trustees need licensing, why not professional foundation councils? Buyer beware.

Doctor’s Orders

One concern shared by many is the protection of assets and whilst legitimate tax savings might be a plus, insulating assets is a key reason for going offshore. Regular readers since 1997 will know

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that I have often said that privacy and protection are usually the most important motives. Take the case of a successful doctor from California who purchased an apartment in Panama. A widower, who likes the cosmopolitan atmosphere of Panama and intends to enjoy the use of the apartment during his lifetime, wanted it to be left to certain relatives in Europe upon his demise. What constantly worried him, however, was the possibility of a malpractice lawsuit in his specialised field of medicine and which had the potential of depleting his assets. Lawsuits were featured in detail in the OPQ in 2002 (June), 2003 (December) and 2005 (March). Although the doctor understood that complete protection was not possible, certain of his assets could be legitimately insulated by putting them out of the reach of claims.

Central to the doctor's plans, of course, was the need to first get expert advice in California before instructing the offshore practitioner. Following that a Panamanian company (I shall call it "Kildare" which, unfortunately, reveals my age to some readers) was created to purchase the apartment here in Panama. Purchasing property in the name of a

company, incidentally, means that it might be possible for any subsequent sale to only entail the transmission of its shares, as opposed to the need and expense of having the property transfer recorded at the Public Registry. The shares of Kildare were gifted to the foundation which also makes income payments to the doctor subject to strict criteria. In order to create an income stream a sum of money was gifted which was used by Kildare to create an appropriate investment portfolio with an international financial institution. This is just one example, in the briefest of terms, of how useful offshore structures can be and how Panama can be the ideal location for some of them. We usually only hear the horror stories about how things went badly wrong offshore, but the truth is that there are a large number of structures which are very successful. I can think of a doctor in California who would agree with me. But, of course, in every instance preliminary planning and caution is essential. Be wary, for example, of practitioners (not just in Los Angeles) with stuffed bears in their offices.

Offshore Pilot Quarterly has been published since 1997 by Trust Services, S. A. which is a British- managed trust company licensed under the fiduciary laws of Panama. It is written by Derek Sambrook, our Managing Director, who is a former member of the Latin America and Caribbean Banking Commission as well as a former offshore banking, trust company and insurance regulator. He has over 40 years private and public sector experience in the financial services industry. Our website provides a broad range of related essays.

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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