



Bermuda Report

Attacks by the “onshore” powers against “offshore” centres are not new. Almost fifteen years ago now, some predicted their demise with the introduction of compulsory anti-money laundering procedures and regulation¹. The OECD launched its campaign against “harmful tax”². Proclaiming the goal of a “level playing field”, it pitted the offshore centres against each other, whilst overlooking that within its own membership there continue thriving examples of two-tier tax systems (UK) and where customer due diligence does not meet international standards (US). The offshore centres countered that they are legitimate financial centres, providing competitive services to international commerce. In the private client context, we contended there was no argument against the need for customer due diligence³ and protecting against the proceeds of crime including tax evasion. Further, offshore centres provide real values for the international private client: stability, confidentiality, freedom of testamentary provision, flexible and innovative trust and company law. This proved to be correct, with unprecedented growth in the offshore centres in the last decade in numerous sectors including the funds industry (Cayman), insurance (Bermuda) and corporate vehicles (BVI).

However, even against this backdrop of longstanding criticism of major countries, offshore centres perhaps were not prepared for the attacks in 2009 from the G20 Summit in London held on 2 April 2009⁴. In conjunction with the OECD, there was a “white list, grey list and black list” of offshore centres. The new benchmark was the adoption of agreements providing for exchange of tax information (“TIEAs”). There was rhetoric proclaiming the “end of tax havens” and blaming the offshore centres for the global financial crisis.

¹ See Christensen, J.E. and Hampton, M.P. (1999) ‘All Good Things Come to an End,’ *World Today*, 55:2-3, 14-7.

² OECD (1998) *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD).

OECD (2000) *Toward Global Tax Cooperation Progress in Identifying and Eliminating Harmful Tax Practices* (Paris: OECD).

³ For more than fifty years Bermuda has been careful to ensure that it “knows its customers”. The Defence (Finance) Regulations were introduced in 1940 to enable Bermuda to control (or to prevent) transactions with wartime enemies. See also the Proceeds of Crime Act 1998 and related legislation.

⁴ See <http://www.londonsummit.gov.uk/resources/en/PDF/annex-strengthening-fin-sysm>

In such an environment one would expect a “battening of the hatches”, a mindset to stifle creativity. That has not been the case in Bermuda. Throughout the last ten years we have seen regular and innovative reforms of our trust and company laws, a robust judiciary, and increased resources for regulation. So, how does this climate impact the international private client?

Whilst there have been no reported cases yet under the new Tax Information Exchange Agreements (“TIEAs”), information and the protection of access to it, will remain key for private clients. The TIEAs introduce a statutory framework in which one “competent authority” may request of another assistance through the exchange of information relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes and tax matters. There are various procedural safeguards to prevent “fishing expeditions” by the authorities. We would anticipate that clients will continue to make use of offshore entities to maintain the legitimate privacy of their personal information, much of which is irrelevant to tax, including succession and estate planning, corporate governance of privately held businesses and philanthropic objectives. On 30 September 2010 the OECD Global Forum released peer reviews covering the legal and regulatory frameworks for transparency and exchange of tax information in Bermuda, Botswana, Cayman Islands, India, Jamaica, Monaco, Panama and Qatar. The 71-page report on Bermuda states that Bermuda has in place all the elements necessary to achieve international tax transparency. However, it identified Bermuda’s International Cooperation (Tax information Exchange Agreements) Act 2005 which contains a provision that could allow the Minister of Finance to turn down a request for information under a TIEA when the Minister is not satisfied that the requesting party will keep the information confidential as an area of concern.

Whilst unlike some other jurisdictions, Bermuda has no statutory “right to privacy” or “secrecy laws”, our trust and company laws enable information to be held on a confidential basis. Under Bermuda common law (which follows English law) Trustees are bound in equity and under the terms of the Trust if it so provides (and other trust documents, such as a letter of wishes) to hold trust information confidential unless compelled to disclose by a competent Court. Thus, placing information into the hands of a professional trustee of a Bermuda law trust will mean that disclosure of that information to third parties is protected by a professional bound by law unless compelled otherwise by an order of the Court. Bermuda’s company law continues to enable the affairs of a Bermuda company to be conducted in private. A company’s by-laws are not available for inspection by the public. The preparation and presentation of financial statements to a company’s shareholders may be waived, and if they are produced they do not need to be submitted to any public authority.

A second area in which we have seen innovation is the establishment and use of private trustee companies (“PTCs”). Unlike some other jurisdictions, Bermuda PTCs have never been required to be licensed, and so the incorporation and conduct of their affairs has been straightforward, private and efficient. This exemption from licensing was confirmed and updated in the Trusts (Regulation of Trust Business) Act 2001. PTCs offer a host of creative benefits for the private client or family. Risk: they may act as trustee to hold underlying assets in a location or business that may conflict with the risk policies of a licenced professional trustee. Continuity and direct involvement: PTCs can provide positions for family members on the board of directors or committees of the PTC. This will avoid staff turnover which can be an issue at professional trustees. Control: this is frequently an issue for clients, especially those from civil law countries. PTCs in Bermuda may be created with or without share capital, the latter can be effective for inheritance planning in a client’s home jurisdiction. Depending upon the ownership structure and home jurisdiction requirements, a client may be able to control the appointment and removal of the board of the PTC. Inherent flexibility: because a PTC operates in the structural sense as an exempted Bermuda company, not only does this offer clients a more familiar platform than a trust, it also affords creativity in terms of structuring shareholding and composition of the board. PTCs can be created with different classes of shares and different classes of directors. For example we have seen a PTCs board comprised of Family Directors and Outside Directors and five different classes of shares, together with tailored voting rights. Global application: a PTC can act as trustee of multiple trusts in multiple jurisdictions if desired.

Philanthropy has been big business since before the days of the Gettys, Rockefellers and Hearsts and that tradition continues today. Increasingly we see the philanthropic objectives of wealthy clients forming part of their offshore planning. Bermuda law follows the English common law definition of charity, and so difficulties can arise if a client’s objectives are beyond the fairly narrow scope of the traditional definition of “charity” and extend to more philanthropic, benevolent and socially useful or benevolent. The Bermuda trust for charitable and non charitable purposes, first established in Bermuda 21 years ago under the Trusts (Special Provisions) Act 1989, is well established to provide creative solutions for philanthropic structures. Purpose trusts can be created by clients for any purpose that is sufficiently certain, lawful and not contrary to public policy. Settlers can reserve key powers, including a general power of appointment. Purpose trusts can also now be established in perpetuity as to both capital and income, so in any given year if it is desired income can simply be accumulated to the principal of the trust.



Finally, another area in which we see increasing use is the courts. As under English law, the Bermuda Supreme Court has equitable jurisdiction to oversee the ongoing administration of trusts. We see a developing role of the Court for trustees, beneficiaries and others, protectors for example, to apply to the court for oversight and directions in a variety of contentious and non-contentious matters. Recent examples of applications include variation of default trusts, determination as to validity, granting letters rogatory from a foreign court in relation to a Bermuda trust. Bermuda (like Cayman and BVI) has strong laws protecting Bermuda trusts from being varied or set aside pursuant to an order of a foreign court relating to heirship rights, personal relationships or matters of insolvency. To our knowledge there have not yet been any decisions of the courts on this legislation⁵. It is now possible to make application to the Court in Bermuda to extend the perpetuity period of existing trusts. This may be of interest to clients for succession or other planning purposes.

Looking ahead, contrary to political rhetoric, the offshore centres have not retreated from recent challenges, but have raised the bar. Tax is important but is by no means the only feature clients and their advisors consider in creating structures, as the foregoing shows. The offshore centres are coordinating at an unprecedented level⁶. If anything, challenges to the legitimacy of these centres and products has strengthened our resolve and stimulated creativity.



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⁵ Other than the case of *Garner v BTC and Schindler* [1992] BDA LR 34 which was determined on previous legislation

⁶ see <http://www.ifcforum.org/index.php>