

Regional focus: offshore

Shoring up reputations



LOUD SHIRTS, PANAMA HATS AND BOXES OF CIGARS – THAT WAS THE IMAGE OF OFFSHORE JURISDICTIONS. **JONATHAN AMES** FINDS THAT MODERN PRACTICE HAS CHANGED – AND AT LEAST ONE ONSHORE LAW FIRM IS LOOKING FOR A SLICE OF THE ACTION

Offshore investment and the professionals who deal with it have something of an image problem with the developed world's tax authorities – and it is a problem that only gets worse in a harsh economic climate.

Take, for example, a typically aggressive statement from the UK's Revenue & Customs department issued at the beginning of this year. 'The game is up for those going offshore to evade tax,' boomed David Gauke, the Exchequer Secretary to the Treasury.

A junior post that may well be in the British government, but Mr Gauke puffed up his chest and continued: 'We have given HMRC an extra £900 million to tackle tax cheats because we are prepared to act against the minority who refuse to pay what they owe.'

Top UK civil servants also weighed in. Dave Hartnett, permanent secretary for tax, was equally robust: 'We are serious about tackling offshore evasion. Hiding tax liabilities offshore believing that you will never be discovered is no longer a realistic hope.'

Words and action

They supported those hard words with some significant action, putting in place a regime that now sees Britons facing penalties of up to 200 per cent of the tax evaded. 'These new penalties will increase the deterrent against offshore non-compliance,' said Mr Hartnett. 'They build on other activity, including signing tax information exchange agreements, requiring information about offshore bank accounts and disclosure opportunities.'

The UK is hardly the only country seeking to bolster shrinking post-recession coffers by closing tax loopholes offshore. Elsewhere in Europe,

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the German government appears to be equally tenacious and farther afield the US Internal Revenue Service has recently adopted an almost evangelistic approach to tracking down citizens with money offshore.

Lawyers working in offshore jurisdictions also struggle against preconceived notions of their roles. They labour under the image of a floral-shirted chap in Panama hat, sucking on an indecently large cigar, lounging pool or beach-side, only disturbing that routine at regular intervals to press the 'on' button on a metaphorical washing machine to cleanse bundles of clients' soiled cash.

As amusing and entertaining a picture as that may be, practitioners fervently maintain that it is based on stereotypes and ignorance. Quite simply, the best known offshore jurisdictions are in fact now far better regulated than they were, say, a generation ago, and the work conducted in them by lawyers is of the respectable company-commercial variety found in Wall Street and the City of London.

Expanding market

Indeed, the so-called global elite of offshore specialist law firms arguably rivals their New York White Shoe and London Magic Circle counterparts. The big names include Walkers (with offices in the British Virgin Islands, the Cayman Islands, Delaware, Dubai, Dublin, Hong Kong, Jersey, London and Singapore), Maples and Calder (BVI, Cayman, Dubai, Dublin, Hong Kong and London) and Ogier (Bahrain, BVI, Cayman, Guernsey, Hong Kong, Dublin, Jersey, London and Tokyo).

However, that elite is being challenged by firms of rising reputation, including Harneys (the oldest firm in the BVI, having just marked its 50th anniversary), Conyers Dill & Pearman and Appleby – as well as one established European onshore practice that is trying to crack the market, London-based Withers.



Hamilton: Bermuda's capital hosted Thyssen family dynasty bust up

Just as the financial crisis has triggered a welter of increased regulation in the onshore world, equally offshore advisers are preparing themselves and their clients for a similar rising tide of rules and supervision

What they all share is a slight resentment at the stereotyping – and occasionally worse – of their sector. Comments Ross Munro, an English solicitor and partner in the investment funds and regulatory department at Harneys: 'Two or three years ago there was a genuine concern that the offshore world was being blamed for just about every misfortune the wider world was suffering. We always felt that was misconceived and wrong – and over time the rhetoric coming out of Washington and London has begun to settle down and a more pragmatic and wider view of what has gone wrong with the global financial system is being taken.'

John Collis, the Bermuda-based chairman of offshore law firm Conyers Dill & Pearman, describes sabre-rattling in London, Washington and Berlin as being a recurrent theme. 'Every now and then they feel it is good to stand up and say we are going to check on all our citizens who are using offshore accounts or not declaring their taxes. It doesn't have a large impact on us as a law firm because we are substantially a company-commercial, Fortune 500 type of firm.'

Indeed, the top-tier offshore legal practices generally devote their time to deals for multinational companies that are buying businesses or cutting joint ventures globally. And the reality is that, for the most part, offshore legal practice is susceptible to the same vagaries of the global economic climate as is onshore. And just as the financial crisis has triggered a welter of increased regulation in the onshore world, equally offshore advisers are preparing themselves and their clients for a similar rising tide of rules and supervision.

'There will be more regulation within the offshore centres,' says Mr Munro bluntly. He points out that his firm and its counterparts are currently devoting significant time to preparing for implementation of the Alternative Investment Fund Managers Directive – EU legislation that will subject hedge funds and private equity funds to supervision by a union regulatory body – which has been decried in some quarters as being overly protectionist and prescriptive. However, Mr Munro is not panicking: 'This is not a fundamental change to the landscape, but it means

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that we have to make sure that the regulators have access to information about the business that is being conducted.'

Following the rules

The directive is set to come into force in 2013, but according to lawyers, various transitional arrangements will effectively delay any practical impact until as late as 2018. Nonetheless, regulators in offshore jurisdictions such as the British Virgin Islands (BVI), where Mr Munro is based, will have to enter into co-operation agreements with their counterparts in Europe.

'We don't see that as a huge problem,' says Mr Munro, 'because most BVI and Cayman regulators are signatories to the International Organisation of Securities Commissions (IOSCO) memorandum of understanding, which covers a lot of the same ground – although there is perhaps a crucial difference between an MoU and an actual agreement. So there will be some work to be done in relation to those agreements.'

Offshore lawyers are also keenly waiting to see how the recently enacted Dodd-Frank legislation in the US – which aims at a profound reform of the financial services sector – pans out in practice. But in general, says Mr Munro, 'It is likely that in the funds world that the barriers to entry are getting higher in the US and Europe. It is increasingly difficult to wake up one morning, fall out of bed and set up a hedge fund. It is much more involved and probably quite rightly'.

Indeed, those increased complexities favour the more established centres for investment funds and the lawyers in those markets.

In general terms, offshore lawyers, in common with their onshore counterparts, have been monitoring economic conditions in Asia and that region's growth compared with relative decline in the west. About six months ago, says Mr Collis, 'we noticed that Asia had picked up to a point where it was back to – and in some cases ahead of – recession levels. That was a good sign that the position was

recovering, although it may also have reflected the uniqueness of Asia, where they decided they weren't affected by the western crisis and went back to their merry ways.'

Mr Collis also says there are signs of a US recovering in the mergers and acquisitions sector, although Europe has been much slower to get back on its feet. 'The world is recovering at three speeds,' says Mr Collis: 'Fast is Asia, medium is the US and very slow is Europe. So as a firm, we are beginning to expand again in Asia, and marking time in Europe.'

Taking the plunge

Interestingly, one European firm took the plunge in the teeth of the recession and dived into the offshore market. London-based private client specialists Withers, with European offices in Milan, Geneva and Zurich, opened in the BVI two years ago, primarily, explains partner John Wall, as a litigation player, although the firm also does offshore corporate work.

Explaining the rationale for the move, Mr Wall says: 'Historically, a lot of large on-shore commercial law firms – when they were involved in a piece of offshore litigation – would have come into the jurisdiction, but run the case from afar.'

One of the best examples of that technique was the litigation exploding out of the Thyssen family feud of 2002. The battle involved an aristocratic row over a European family fortune worth at the time nearly €3 billion. It was fought in a Bermuda courtroom and involved City law firms Clifford Chance, Norton Rose and Davies Arnold Cooper and great swathes of the London commercial bar. The case settled in the end, but only after six months' opening argument and a legal bill estimated to be scrapping the €150 million mark.

Since then, says Mr Wall, 'the offshore firms have got better and more respectable and are now taking that type of work away from the onshore firms. And our presence here was driven by the fact that there

Out to sea

What is the advantage of going offshore now that the days of tax avoidance and non-existent regulation are receding? Specialist lawyers explain that offshore jurisdictions offer neutral platforms to for the assembling of deals in the most efficient tax structure possible.

They also point out that there are different jurisdictions and tiers for various industries. The BVI and Cayman Islands are seen as benefiting from British Overseas Territory status, while remaining low cost and comparatively low regulation. Cayman is by far the leading hedge funds jurisdiction, while the BVI is the leading corporate domicile jurisdiction, having overtaken Cayman. Both have global reputations that stretch from Europe to Hong Kong to Africa to South America. Says one lawyer: 'Wherever you go in the world, people are using vehicles in those jurisdictions.'

The Channel Islands and the Isle of Man (*flag above*) – all British Crown Dependencies – are seen as involving

slightly higher costs and more regulation. But they are arguably more widely used in Europe because of their biggest advantage – time zone, the convenience of being able to get hold of a lawyer during the client's working day, without having to wait until lunchtime.

Other European jurisdictions include Switzerland, Luxembourg and to a certain extent Ireland. Indeed, both Ireland and Luxembourg are slight hybrids, not truly offshore as they are within the EU, but they do get lumped together as potential fund domiciles. Widening the definition even further in the EU, Holland and Spain are often used for holding companies in international transactions owing to beneficial tax treaties.



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is lots of great litigation work offshore.'

One of the most significant recent developments in the BVI has revolved around the fallout from the Bernard Madoff Ponzi scheme. Two of the largest institutional investors – or so-called feeder funds – with Bernard Madoff Securities were based in the jurisdiction, Fairfield and another fund called Kingate Global. Those feeder funds sold themselves to the market by claiming thoroughly to investigate the best investment opportunities, having undertaken appropriate and comprehensive due diligence.

'Both of those funds are now in liquidation,' comments Mr Wall wryly, 'and there has been lots of interesting issues arising out of that. One of the things that has kept us very busy as litigators in the BVI is handling

all the Madoff issues – a large amount of that has been played out here.'

Reputation boost

Helping to boost the BVI's reputation recently has been the launch in November 2009 of a dedicated commercial court complete with a full-time specialist judge, English lawyer Edward Bannister QC. It is a move that echoes attempts by other emerging jurisdictions – such as Dubai in the United Arab Emirates and Doha in Qatar – to establish serious, high end commercial courts.

The creation of the court, says Mr Wall, 'is a reflection of the amount of business that gets done in the BVI. It is the leading offshore centre – it has more offshore companies than any other territory. There are something approaching 600,000 companies registered here.

And all of that business is high end commercial that requires specialist legal advice and a specialist judges'

While it may well be expanding in scope and respectability, the offshore world is still a comparatively small community. How have the Withers lawyers found the reception as they've muscled in?

'We are one of the few firms on the island that is regulated by the Solicitors Regulation Authority and that gives us something of a competitive advantage,' says Mr Wall, before remarking that 'local firms have been fairly hospitable – although I'm sure there have been some concerns that the arrival of Withers will herald the arrival of other onshore firms.'

Having said that, there are no current market rumours that any other English or continental European firms are looking to move in.

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