



AN OFFSHORE TRUST: THE CHAMELEON OF FINANCIAL STRATEGIES

Despite a mixed reception from OECD governments and public outrage based on the perception that trusts are amoral, the offshore trust continues to thrive as one of the most important elements in the majority of offshore financial planning strategies. It is not just that it is so flexible, almost chameleon-like in its ability to adapt to any particular legal terrain, but it also has a heritage which can be traced back centuries. Thus it is ingrained in common law and provides a monumental body of legal precedent for application and recourse to when necessary.

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

When I was preparing a draft of the trust law for the British Overseas Territory of the Turks & Caicos Islands in 1989, and which was operative for more than 25 years, I relied in large part upon an ample supply of offshore trust law precedents and my experience as an international practitioner since 1971, to frame its broad terms and then I worked some innovations into the provisions. Importantly, there was no attempt made to codify the law of trusts, employing a straight jacket when there is no need for one. It will be discovered, however, that the fundamentals will remain the same, regardless of an individual's jurisdictional preference.

There is an argument that trusts are best settled by the client rather than being declared by third parties because by affixing his signature to the deed, the client is confirming his agreement to the settlement and acknowledging its terms. Then again, where a client wants no visible connection with the deed (which may be examined, for example, by third parties) a declaration of trust has its attractions. A popular type of trust is the express discretionary trust which is usually declared - as opposed to settled - by a third party on behalf of the individual or corporate party wishing to place assets into trust (settlor). This method of creation does, of course, obscure the identity of the settlor and even where he is to be a beneficiary his name need not appear as a beneficiary in the deed either. The settlor can be added subsequently to the beneficial class and his name will be recorded in a separate deed of appointment. In such a trust the beneficiaries have no vested (fixed) right to any of the trust's assets and the trustee decides (either solely or in conjunction with others) which beneficiaries will benefit. It is, however, quite normal in such circumstances for the client to deliver a letter of wishes to the trustee indicating who should benefit, including the conditions and amount. Unless the wishes



expressed are contrary to public interest, unreasonable or incapable of performance, there is little doubt that a professional trustee will comply, although he is under no legal obligation to do so. Letters of wishes can be cancelled or revised at any time, and can be very useful aids in keeping matters confidential. Unfortunately, their usage has been abused by the inexperienced and the concept has been debased by utilising them under conditions for which they were never intended. Strict rules apply to avoid their misuse, but if you employ the services of a professional trustee, however, you will avoid the pitfalls.

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

1. The distribution of funds (discretionary or vested) and the powers granted to third parties;
2. The trustee's administrative powers as well as rights and duties;
3. The appointment or removal of trustees and the trustee's powers of delegation;
4. The trustee's personal relationship with the trust fund and the beneficiaries. One needs to be mindful of conflicts of interest (such as where the trustee may also serve as banker).
5. The choice of the proper law and jurisdiction, including changes to the proper law and place of administration. It is possible to have the trust administered in one jurisdiction while, at the same time, have the law of another jurisdiction govern the trust deed. This ability to have flexibility can, in some cases, prove to be advantageous. There can be several reasons for this, two of which are that it might be considered prudent to locate the trust's records (administrative and accounting) perhaps in a place which affords superior laws of privacy, although not necessarily a better trust law, and, secondly, a particular trustee is preferred who happens not to be located in the jurisdiction which controls the law of the trust.
6. The duration, revocation and amendment of the trust. A decision has to be made as to whether or not the trust should be irrevocable, including its terms. Often the answer hinges on the question of taxation, especially as to whether or not the gift of assets to the trust is to be absolute. Besides duration and revocation, consideration needs to be taken of changing circumstances, some of which can be unexpected. A power of amendment could be included (the exercise of which, by whom, and how, are matters to be addressed) so that part or all of the assets, for example, can be transferred to a



new or existing trust located elsewhere and with other trustees. Perhaps the mandated terms of investment can be altered under certain conditions.

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

This summary only covers general issues and each individual case will require, after an initial analysis has produced the trust deed's broad framework, a second careful review after which a final deed can perhaps be drafted. It is imperative that you avoid Espresso trusts. Espresso means coffee that is prepared on the spur of the moment. The enjoyment is short-lived, just like the advantages of such a trust which has not been thought through.

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