

Some thoughts on a Post Pandora world.

As a seasoned multi-jurisdictional practitioner, I have been asked a lot about the "Pandora Papers" in recent times. Pandora's box contained much of the world's evils - what about her papers? Here are some thoughts:

Illegally obtained information

Yes, the information was hacked/stolen/illegally disclosed. This should not be forgotten but is not going to shift the debate. Nor is it definitively going to let clients off the hook on a "fruit of the poisonous tree" type basis.

This is nothing new. See this fascinating piece by Professor Michael Dirkis of Sydney University [\[1\]](#). Furthermore, the journalists are increasingly relying on the "public interest" justification rather than specific disclosure of wrongdoing. In fact, the latest Pandora Papers "revelations" do seem to contain more disclaimers than previous pieces.

There will always be a risk of hacking and there will always be the likelihood of (need for?) whistle-blowers as human beings are not perfect. Whistle-blower rewards must only be paid where justified and not just for divulging confidential information. The issue of whistle-blowers is a hot topic in the wealth industry and wider society [\[2\]](#).

Will we ever find out how the information was obtained in the case of the Pandora Papers or any of the other instances?

The ICIJ and their partners are not going to divulge sources. The service provider victims are not likely to draw attention to internal matters. I am already seeing clients looking to shift away from the service providers and / or jurisdictions from where the information originated.

I would hope that the regulators are making enquiries of the service providers to ascertain how the information was obtained. Certainly, the BVI Financial Services Commission and the MAS in Singapore have powers to inspect regulated entities to check compliance with all regulations.

Irrespective of whether there are any breaches of AML/KYC obligations – and there is no evidence of that from what has been divulged in the press- data security is still important.

In terms of data, the MAS states that it *“regularly assesses financial institutions’ cyber resilience through its supervisory programmes. Where there are areas of potential vulnerabilities, MAS requires the financial institution to develop a remedial plan and will monitor the financial institution’s rectification of such gaps. MAS will continue to*

work with our financial institutions and industry partners to enhance the financial sector's cyber resilience."

The BVI has just enacted the Data Protection Act 2021. This would require "*Data controllers [to] take practical steps to protect personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction.*"[\[3\]](#)

The Cayman Islands and Guernsey (and no doubt others) also have specific cybersecurity policies for regulated entities.

The wealth management industry is not all about "offshore"

We knew this all along but the Pandora Papers information concerns structures in the US, Singapore, UK, New Zealand and not just the standard "palm-tree laden islands in the Caribbean or Pacific" as are usually trotted out. More particularly the media did pick up on this point. In fact, to many clients what are seen as "onshore" or "mid-shore" jurisdictions are effectively "offshore".

Everything is not perfect in the state of Denmark

However, the wealth management industry is certainly not as rotten as some would allege. I think it is important that those of us in the industry do participate in the debate at a rational level (see below). In my view, a "*nothing to see here*" argument is somewhat disingenuous.

I would encourage readers to go beyond the "Pandora Papers". Over the last couple of years I have read books such as *Moneyland*, *Billion Dollar Whale*, *Dictatorland*, *McMafia*, *The Key Man*, *Kleptopia* and *The World For Sale*. Even allowing for author bias and perhaps a certain amount of inaccuracy, it is still evident that structures, institutions and persons in the wealth management industry appear to have been involved in facilitating illegal acts and the proceeds therefrom. Recognition of this is needed - balanced with the fact that the majority of the industry is clean.

There is no need to have to defend the use of structures established in international finance centres

For many clients, the benefits are self-explanatory. By way of example see an excellent piece from a London practitioner[\[4\]](#).

To read that *certain* wealthy and/or famous people have offshore structures is not a surprise – in fact I would be surprised if they did not. Many clients today have many factors necessitating such structures. That they should be compliant goes without saying.

Furthermore, the UK non-dom regime is not a “loophole” – [in fact I find it ironic that a firm of accountants was sued for not bringing this regime to the attention of their client[\[5\]](#) (did not succeed on the facts)]. However, for a non-resident or non-domiciled client purchasing UK residential property prior to ATED and the CGT/IHT reforms, it would have been remiss to not suggest an offshore structure.

For a client to benefit from the remittance basis, the assets need to be outside the UK i.e. "offshore". It would seem prudent to establish said structure in a stable jurisdiction with the rule of law and the common law legal system -without additional tax.

The enablers

The Pandora Papers have focused on the so-called “enablers” and this had been a trend before the Pandora leak. See the OECD paper[\[6\]](#), SRA paper[\[7\]](#) and the Alliance for Securing Democracy Paper[\[8\]](#) by way of background. See articles such as this for further commentary[\[9\]](#)

To have certain sectors of the industry not subject to recognised AML requirements in certain jurisdictions (legal professionals in the US and Australia being prime examples) needs to be remedied. That said, there are arguments why the FATF approach does not exactly fit attorneys in the US[\[10\]](#) . So whilst the US is "non-compliant", it is not AML-free.

Cash is still king

The banking system still has a huge part to play. Source of wealth, transaction monitoring and the like must remain a key part of the compliance battle. Perhaps correspondent banks need to take more of a role. It must not matter that the client is important and/or wealthy.

No matter the structure, it is safe to say that the wealth did not originate in Sioux Falls, Charlestown, Road Town, George Town, Victoria or the like. Nor is the cash likely to be retained in these places.

Proper debate

There should be a proper debate. Journalists and authors need to sell copy so are not always grounded. We should avoid there being polarised views. This should not turn into “rich versus poor”; “onshore versus offshore”; “moral versus immoral”; “wealth management industry versus the rest”.

In this regard, the use of language is important.

For example, I find the use of the frequently used term “anonymous shell company” misleading. “Anonymous” to me is different from private. So, if the ICIJ team have joined the dots (and we don’t know how) to link company X as being owned by person Y – it is not “anonymous”. It may not be public knowledge but the company is not “anonymous”.

Likewise, “shell company” has different meanings.

The OECD define in one publication thus:

“SHELL COMPANY - A company set up by fraudulent operators as a front to conceal tax evasion schemes” [\[11\]](#). Not much room for debate there!

And in another [\[12\]](#), shell companies are *“entities established not to pursue any legitimate business activity but solely to obscure the identity of their beneficial owners and controllers, constitute a substantial proportion of the corporate vehicles established in some OFCs.”*

This EU [\[13\]](#) paper does actually debate what is meant by a shell company.

The SEC states that *“Shell companies have no or nominal operations, and either no or nominal assets, assets consisting solely of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets.”*

Thus, a company established to hold various assets in different jurisdictions (to simplify succession being an obvious reason) with proper governance and compliance with laws and regulations would not meet the definition of a shell company. Nor would it be “anonymous” if beneficial ownership requirements (see below) were carried out (as they would be required to be in most places).

Likewise the use of “tax haven” is pejorative. The use of international finance centres is mis-understood. See for example the attached from the Cayman Islands [\[14\]](#). Most people with a pension will benefit from Cayman structures.

Illegal is different from immoral

Illegality needs to be clamped out. [Perhaps there needs to be more examination of "grey areas" such as clarification that this extends to exchange control and disclosures of politician’s interests?]

The morality debate is valid but is a separate one.

Tax planning is still allowed last time I checked. Tax “avoidance” may now have crossed the floor to join tax evasion on the wrong side of the line. In any event, not all planning is about tax[15].

Unequal division of wealth is a valid topic but should be kept separate from matters of theft, corruption and money laundering.

Likewise, the fact that members of royal families in many states are “entitled” to vast wealth may not be “fair” but it is not a crime. Contrast this with say an oil minister in Africa (allegedly!) getting kickbacks for drilling permits.

The leaked/stolen data needs to be shared

Will the data be shared with anyone? The ICIJ have put together the “Offshore Leaks” databases where names can be searched. This is used by compliance staff. However, it doesn’t really establish anything other than a name being linked somehow to a structure somewhere amongst X million illegally acquired documents. It can be an inconvenience to have been included in the stolen data.

“The long-standing policy of ICIJ is not to turn over such material. The ICIJ is not an arm of law enforcement nor an agent of the government. We are an independent news organization, served by and serving our members, the global investigative journalism community, and the public.”[16]

However, without seeing the actual information it is difficult to ascertain how certain structures are linked to particular persons and also what due diligence was carried out by whom and when.

The SRA in the UK have requested some of the Pandora Papers documents referring to UK law firms[17]. I would also expect regulators in other jurisdictions to do likewise - if only to confirm compliance with a PEP policy for example.

Do the leaks also contain evidence about those who (allegedly!) gave the attributed wealth to said politicians? Could there be criminal matters relating to corporations paying bribes?

PEPs/ Source of wealth/transaction monitoring

The main issue that leaps of the pages in these latest “revelations”, relates to the apparent connections of certain PEPs to levels of wealth not commensurate to their status.

Most jurisdictions have specific rules relating to PEPs. There generally needs to be enhanced due diligence and enhanced “transaction monitoring.”

The ICIJ’s partners seem not to have conclusive proof of any crimes or are scared of being sued (or worse)- otherwise why not actually report fully?

Beneficial ownership disclosure needs a revamp

Beneficial ownership is also a hot topic. The FATF plenary released proposed enhancements[18] to their recommendations. They are proposing a compulsory register but do not require it to be public. I agree that the misuse (or even use) of nominee directors needs to be dealt with and bearer shares put back into Pandora's box.

Public registers will not work as has been seen by various reports in the UK where dead people and children were controllers of many companies. [19] I am sure M. Mouse has a sizeable portfolio too.

Properly maintained and verified private registers are the way forward. Even then, clients are still concerned by how this data may be leaked (so in some respects the ICIJ are putting off the adoption of registers). The rules need to be more clear and more consistent. Could some form of global standard be used? See this fascinating article by two of Hong Kong’s leading practitioners on such a proposal[20].

Where trusts are used, the position is far too confusing. There are large differences between jurisdictions. Simple is better. If trustees are properly regulated and compliant surely there can be cross-referral?

I am sure that this won't be the last time these issues are visited.

[1] A paper presented to the Sydney - Max Planck Institute tax research conference, University of Sydney, 28 November 2016
see https://www.sydney.edu.au/content/dam/corporate/documents/sydney-law-school/news/Lion_MaxPlanckversion.pdf

[2] <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/April-2021-Review-of-CG-Code-and-LR/Consultation-Paper/cp202104.pdf> see para 17 for example

[3] <https://www.ogier.com/publications/data-protection-legislation-has-arrived-in-the-bvi>

[4] See for example Arabella Murphy <https://www.spearswms.com/pandora-papers-in-defence-of-offshore-trusts/>

[5] <https://www.bailii.org/ew/cases/EWCA/Civ/2014/358.html>

[6] <https://www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collar-crimes.htm>

[7] <https://www.sra.org.uk/sra/how-we-work/reports/aml-risk-assessment>

[8] <https://securingdemocracy.gmfus.org/wp-content/uploads/2021/09/Enablers.pdf>

[9] <https://link.springer.com/content/pdf/10.1007/s12117-020-09401-y.pdf>

[10] <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2737&context=ilj>

[11] <https://www.oecd.org/ctp/glossaryoftaxterms.htm#S>

[12] <https://www.oecd.org/daf/ca/43703185.pdf>

[13] https://www.europarl.europa.eu/cmsdata/155724/EPRS_STUD_627129_Shell%20companies%20in%20the%20EU.pdf

[14] <https://blog.cayman.finance/is-cayman-tax-haven>

[15] See footnote 4

[16] <https://www.icij.org/investigations/pandora-papers/frequently-asked-questions-about-the-pandora-papers-and-icij/>

[17] <https://www.lawgazette.co.uk/news/sra-wants-to-see-evidence-gathered-from-pandora-papers-leak/5110052.article>

[18] https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/Pdf-file_R24-Beneficial-Ownership-Public-Consultation.pdf

[19] <https://www.amlintelligence.com/2021/06/hiding-in-plain-sight-the-dark-side-of-company-registration-and-what-it-could-be-facilitating/>

[20] <http://philipmarcovici.com/wp-content/uploads/2021/07/Published-Article-Marcovici-and-Noked22.pdf>

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