WealthBriefing
News Insight Intelligence

Commoditisation Of Offshore Trusts - Who Advises The Advisors?

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28 March 2019

A Hong Kong-based member of this news service's editorial advisory board sets out the terrain - and questions - facing clients and practitioners in the offshore trusts sector.

This publication is carrying a number of articles examining the changing world of trusts and other wealth structures. Here to talk about the offshore trust industry is Richard Grasby, who is a member of the editorial advisory board of this publication. In the article, he sets out many of the questions that clients and advisors ought to be asking.

Richard is an experienced offshore private wealth adviser in Asia. He advises individuals, trustees and related entities on cross border private client issues including succession planning and asset holding. Richard has worked previously for leading Cayman Islands / BVI law firms and an international law firm. Richard has been based in Hong Kong since 2009 and prior to this was based in the Cayman Islands. Richard is the immediate past chair of the Hong Kong branch of STEP. He is a member of the HK executive committee of STEP and also on the STEP global steering committees in respect of business families and international clients. Richard is a registered foreign lawyer in Hong Kong and is admitted to practice in England and Wales and the British Virgin Islands. He is also admitted in the Cayman Islands.

The editors of this news service are pleased to share these views with readers and invite responses.
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As a 20-year year veteran of the offshore trust industry, with the last ten years spent in Asia, it is noticeable that there has, in recent years, been a "commoditisation" of the offshore trust. A trust should be a bespoke arrangement tailored to reflect the settlor's wishes and needs. There are signs that the trust is becoming an "off-the-shelf" "fill-in-the-box" product with less and less thought as to what is required.

"How much is a trust?" is a frequently posed question, usually followed by "and how much does it cost?" Neither question is capable of a full response without a great deal more information, but the market has come to expect such questions to be answered – and answered quickly!

Trustees are being asked to quote for trusts with little information. Likewise, quick execution and minimisation of "KYC" documentation are also becoming more and more important. The speed and cost of the trust override the actual trust itself! It is a little like a builder being asked to give a quote to "build a house" without knowing how many bedrooms or whether there is to be a pool.

What are the reasons for this? The would-be settlor is most likely relatively inexperienced in such matters and often relies on his (or her) immediate "advisor". Frequently, the "advisor" is an in-house lawyer for the settlor's business or his onshore lawyer (perhaps from a corporate or family law background) or a financial/investment advisor or even a family member. Indeed in some cases "advisors" may in fact be employees of trustee companies (or their groups). Are they sufficiently motivated to ensure the client gets advice?

There are exceptions, but in the main, such advisors are not always sufficiently familiar with the offshore trust industry to give the best advice to the settlor particularly those settlors who are high net worth clients with complex situations. For lower value clients, a "product' is perhaps the only option which makes sense from a commercial perspective but not for a client with assets into the tens of millions of dollars and beyond.

Assuming that the advisors have basic knowledge of trusts (which is not always the case!), many are not familiar with the range of options available in terms of type of trust, type of trustee and trust jurisdiction. Is then the settlor getting the best choice? Perhaps not.

In terms of type of trust, there are common mistakes such as offering a would-be client a choice between a "reserved powers" trust, a "discretionary" trust or a VISTA trust. In fact, in terms of dispositive powers, most reserved powers trusts and most VISTA trusts [Virgin Islands Special Trusts Act] are also "discretionary" trusts!

Furthermore, the scope of "reserved powers" is a debate in itself! Which powers should be reserved to the settlor or granted to someone else? Investment powers? Powers to add/remove beneficiaries? What are the potential consequences of this?

Is the advisor able to warn against too many powers being reserved or against potential lines of attack on the structure because of certain powers being reserved? In the case of protectors, convenience usually outweighs any detailed analysis, with the settlor's name or that of a family member being inserted automatically into a schedule in a template deed! Is such a person (particularly if not the settlor) sufficiently aware of the scope of such powers?

Is the settlor aware that they do not have to accept a template deed without question? Many clients are under the impression that they have to accept the template with minimal amendments.

Choice of trustee is often overlooked. Many advisors are not familiar with the differences between trustee companies. Cost becomes the dominant factor. Is the advisor getting a commission from the trustee and is this disclosed?

There are issues to be considered when choosing between a bank-owned trustee, a private equity-owned trustee or a privately held trustee. What is the risk appetite? How quickly can decisions be made? What is the fee structure? Bank trustees are able to generate revenue from other channels which may lead to a lower fee being quoted for trusteeship, but what are the conditions for this? Could the trust company be sold or listed? In which case what are the revenue pressures? Could there be a turnover of staff? Which jurisdictions are on offer by the trustee (and which not)?

Furthermore, there are differences between trustees in terms of expertise and familiarity with particular jurisdictions and particular assets. Is the trustee familiar with operating businesses and willing to take them into the trust fund? What about art? Private jets? Will the trustee accept large stakes in listed companies? Is the trustee familiar with specific jurisdictions? The US and France are two which spring to mind. Is the trustee prepared to deal with potential litigation? Or is the trustee just the cheapest?

Employee benefit trusts are also popular in Asia. Does the trustee have the systems to economically administer a trust with often hundreds of beneficiaries?

Private trust companies are also an area in respect of which the settlor's immediate advisor often needs assistance. The question posed is usually "can I set up a PTC?" and is frequently answered in the affirmative - particularly as a PTC can be sourced relatively quickly and cheaply in many jurisdictions with few regulatory burdens.

The proper question, however, is "should I set up a PTC?" This should open up a detailed dialogue discussing expertise to run the PTC, how it should be owned, the regulatory and tax consequences and so on. In many cases the answer should be "no"! Is the immediate advisor sufficiently qualified in this regard? Many clients and advisors confuse the PTC with the trust itself.

Certainly the author has seen many PTCs set up to be run entirely by family members residing in onshore jurisdictions. Are such family members familiar with trusts? Have they read the trust deed? Are trustee decisions properly made? The global drive for substance and transparency will impact on these structures. That said, a PTC can be the best structure for a properly advised client and when structured properly. Such a structure should cost what it costs!

In terms of trust jurisdiction, the advisor typically has a favourite as default or accepts what a trustee offers without further analysis.

In many cases, too little thought is given to the infrastructure of the jurisdiction. What about the court system? Is there experience with cross-border high value trust issues? What about the depth of judges experienced in trust matters? Can the settlor (and others) get legal advice from a range of firms and in a convenient time-zone? Could settlors and beneficiaries base themselves there if required?

What about regulation of trustees? How about the political status of the jurisdiction? Is it a British Overseas Territory or Crown Dependency? Is it independent? Is it in the EU? How is the jurisdiction viewed by others? Will the choice of jurisdiction impact on dealing with third parties such as banks, regulators, advisors and transactional counterparties? A more convenient structure to set up becomes less so if banking and brokerage accounts are subject to more due diligence and business transactions are held up by increased due diligence!

An increasingly common arrangement is that the administration of the trust takes place in a different jurisdiction to that of the trustee and/or that of the governing law of the trust. This also needs to be considered - particularly in respect of availability of information.

Despite trusts across the world having common origins, there are differences between trust legislation and applicable case law. One can sympathise with a would-be settlor thinking that they are all the same – but this is clearly not the case. What about the scope of reserved powers in the statute? What about any perpetuity periods? Are non-charitable purpose trusts permitted? What about the scope of firewall? Degree of protection against future creditors? Flexibility in respect of any variations? Can the beneficiaries terminate the trust? The main trust jurisdictions are constantly tweaking their legislation in this regard.

Admittedly, for many clients, they do not have the budget or complexity to justify a bespoke structure, but certainly for high net worth clients there are discussions to be had. Indeed, for such clients there will often be merit in having more than one structure often with different trustees and in different jurisdictions. It is imperative that these discussions are had with the right people.