

Bucking Historic Trends

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Historic trends are frequently considered when comparing offshore jurisdictions, including for the purpose of choosing a fund domicile. Jersey, Cayman and BVI provide no exception. Theoretically, concentrations of offshore funds may be defined with reference to the status of the promoter, target market of a fund in relation to investors and investments, and investment strategy. Typical examples would include established jurisdictions which are commonly associated with funds versus start-up fund promoters, retail versus private investors, and traditional versus alternative investment strategies. In practice, these may translate to statements concerning the jurisdiction of choice for retail funds, hedge funds, private equity funds, and so on. This article outlines the difficulty with identifying historic trends, and the limited role which they should play in choosing a fund domicile, with a focus on Jersey, Cayman and BVI, given the current level playing field in the offshore legal and regulatory environment, including the standard of fund service providers.

EVIDENCE OF TRENDS

Identifying and comparing historic trends in the context of offshore funds is not easy. Statistics do not exist to verify perceived trends as between jurisdictions (although certain jurisdictions do publish useful statistics in relation to their own fund industry). Meaningful comparison between jurisdictions requires a uniform set of classificatory criteria, for instance in relation to fund promoters, target markets and investment strategies. However, jurisdictions typically approach these matters differently. Definitions are inconsistent (comparing the number of funds, or types of funds, as between jurisdictions is unhelpful if they apply different defining criteria), and regulatory requirements also differ (comparing the number of regulated funds as between jurisdictions is unhelpful if they apply different regulatory thresholds). As a consequence, offshore jurisdictions have failed to date to successfully collaborate in providing comparable statistics to confirm perceived trends.

CHOICE OF JURISDICTION

Apart from the absence of accurate statistics to support perceived trends, there are more substantive issues to consider in choosing a jurisdiction. By way of background, promoters of funds choose a fund domicile based on an array of factors. Significant slots at conferences, published articles and debates analyse the factors involved in the choice. However, only a couple of factors truly qualify as pre-requisites for an appropriate fund domicile, while the remainder relate to preferences, matters of convenience and the like. Two of the most important pre-requisites may be as follows:

- (i) an appropriate legal, regulatory and tax environment; and
- (ii) responsive and well qualified service providers.

Jurisdictional differences in costs are usually insignificant in the context of overall fund start-up costs and have become less of an issue, along with timing, in the key offshore jurisdictions. Assuming a level playing field in terms of (i) and (ii) above, it is submitted that, irrespective of the speed at which different jurisdictions evolved, the value of any perceived historic trend should be disregarded in the future choice of fund domicile. Instead, professional advice should be sought to assist in focussing on the factors that really count.

LEGAL ISSUES

Company, partnership and trust laws are essential to the effective establishment and operation of a fund structure. Although each jurisdiction has evolved at its own pace, Jersey, Cayman and BVI have now all developed a comprehensive legislative framework capable of accommodating a wide range of funds, and providing an appropriate tax efficient legal structure for almost any type of offshore investment fund. Although there are differences in the technical provisions of the laws, competitive spirit has resulted in the development of a set of laws which may be regarded as equivalent to one another in their ability to facilitate fund products. Critical differences between jurisdictions have become few and far between. However, jurisdictional idiosyncrasies do

exist and can be used to the advantage of fund structures with appropriate professional advice.

REGULATORY ISSUES

Regulatory treatment of funds has also evolved. Approaches are different in the offshore regulatory environment, certain jurisdictions providing for a few broad categories of fund regulation and others providing a wide array of regulatory categories with each aimed at a specific market segment. However, offshore fund regulation has generally evolved in line with the onshore move to provide for different levels of regulation dependent on the type of investor who will invest in a fund, primarily distinguishing between retail investors on the one hand, and sophisticated or high net worth investors on the other hand. The latter generally regarded as requiring a lower level of regulatory protection. Each of Jersey, Cayman and BVI now has an appropriate and carefully thought out regulatory category to suit any fund. Again, professional advice can assist in choosing the best environment for a particular fund.

SERVICE PROVIDERS

An appropriate legal, regulatory and tax environment should be necessary, but on its own insufficient, to attract funds to a given jurisdiction. Professional service providers are required to implement and operate the offshore component of a fund structure. Due to geographic separation from clients, responsiveness and reliability of service providers is equally important. The level of service required will be dependent on fund structure, and will not necessarily be the same as between funds. Although Jersey, Cayman and BVI may have evolved at a different rate to one another, in particular becoming specialised at different times in niche markets, today they each provide a broad spectrum of responsive and appropriately qualified fund service providers. Arguably, all things being equal, choice of service provider, including their ability to service a fund business consistently and at the same or a higher level as it grows, should be the most important driver in choosing one jurisdiction over another.

THE FUTURE

Given a level playing field with reference to legal, regulatory and tax considerations, and comparable service providers, perceived trends in choice of fund domicile should be regarded as having historic significance only. This approach is certainly prudent in the case of choosing between Jersey, Cayman and BVI, and further supported by the formation of multi-jurisdictional firms providing consistent legal, administration and other fund services. Cumulatively, these factors eliminate the risk in choosing one jurisdiction over the other for any fund product, including retail funds, hedge funds and private equity funds.

Based on the above, professional advisors should be encouraged to choose a fund domicile (which may include Jersey, Cayman and BVI) with a special focus on the factors that really count.

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