



The Asset Management Landscape in Bermuda

The Asset Management Landscape in Bermuda Has Been Evolving



Tonesan Amisshah
Partner
Appleby (Bermuda) Limited

With a continuing commitment to excellence, through turbulent economic times, the asset management landscape in Bermuda has been evolving with an unrelenting focus on servicing the needs of a diverse and demanding global clientele. In a world of increasing international pressure for heightened regulatory oversight, Bermuda has been well placed and ahead of the game, having consistently maintained the highest of standards, and continues to adapt, applying a risk based approach to regulation. In an environment where one size definitely does not fit all, products are tailored and government works closely in tandem with the regulator and the financial services sector to ensure the requirements of industry are met.

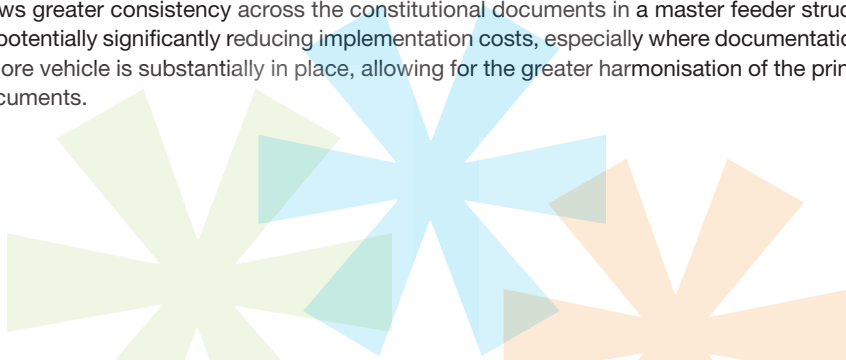
Funds in Bermuda have traditionally been structured as companies, partnerships or unit trusts with the choice of vehicle being driven primarily by investor familiarity and the flexibility offered in structuring. Recent legislative developments have both created new products and amended the rules applicable to existing products to provide increased flexibility.

In 2013 industry stakeholders were asked what was needed for Bermuda to better serve the funds industry. The answers led to substantive amendments to the Investment Funds Act 2006 (IFA), the legislation governing the exclusion, exemption and authorisation of investment funds. These amendments to the legislation saw the creation of more streamlined fund products in the form of two new exempted fund classes, the Class A exempt and the Class B exempt fund offering previously unprecedented speed to market, with lighter touch regulation. The IFA also provides for the registration of various classes of authorised fund under the IFA having greater oversight from the Bermuda Monetary Authority (BMA), Bermuda's financial regulator. It should be noted that all funds are required to register under our Anti-Money Laundering (AML) regulations.

More recently, client demand for limited liability companies (LLCs) has led to the introduction of the Limited Liability Companies Act 2016 (LLC Act) which has been effective since October 2016. The LLC Act introduced into Bermuda the first completely new structure in approximately 100 years with our LLC Act being modelled substantively on the equivalent Delaware legislation.

Although new to Bermuda, LLC's are well known to the US market. The LLC is a hybrid legal structure that allows the contractual and operational flexibility of a partnership to be housed within a corporate entity, thus combining the limited liability protection you would expect from a company or corporation with the freedom of contract and structuring more often associated with partnerships. This should be particularly attractive in the context of private equity as it allows the creation of bespoke vehicles having the contractual freedom to set out in their LLC agreement the terms of operation and management of the LLC, as well as expressly agreeing on the allocation of profits and timing of distributions amongst members. They can also be used as side pockets to insulate liability in a structure.

The commonality with Delaware should prove attractive to sponsors and promoters from the US as it allows greater consistency across the constitutional documents in a master feeder structure, thereby potentially significantly reducing implementation costs, especially where documentation for the onshore vehicle is substantially in place, allowing for the greater harmonisation of the principal legal documents.



Any one or more persons may form an LLC for any lawful business purpose or activity. The formation process is simple and requires the filing of a certificate of formation with the Registrar of Companies and payment of the appropriate fee.

The key features of a Bermuda LLC are:

- That it is a corporate vehicle with separate legal personality. Once formed, an LLC continues to exist until it is dissolved (even where it has no members);
- It is governed by an operating agreement which must be governed by Bermuda law and subject to the terms of that agreement it has the capacity, rights and powers of a natural person, thus allowing for maximum contractual flexibility amongst its members with respect to the allocation of profits as well as the voting and consent rights off different classes or groups of members. LLC interests can be denominated in any currency the LLC chooses; and
- It can be self-managed by a sole member, by all or any class of members or by a third party manager chosen in the manner provided in the agreement.

In addition, a person's duties (including their fiduciary duties) to the LLC or to any member or manager who is also party to the LLC agreement, may be expanded, restricted or eliminated altogether by the LLC agreement (save that no such provision shall permit fraud or dishonesty). This development may also be of particular interest in the context of downstream investments made in joint ventures where the fund would be able to appoint managers that can represent the fund's interests rather than being restricted to those of the LLC as a whole as would be the case in the context of a company limited by shares.

The LLC Act is extremely comprehensive, providing clarity and guidance wherever possible including with respect to winding up and as with companies in Bermuda, an LLC may be amalgamated or merged with a foreign entity, may continue into Bermuda from a foreign jurisdiction or vice versa and may convert into a company or partnership and there are no exit fees payable on deregistration.

Another corporate structure to highlight is the segregated account company which is similar to a series LLC. Whilst these entities are not new, they are being used more and more frequently in the asset management space.

A segregated account is an account within a company containing assets and liabilities that are legally separated from the assets and liabilities of its ordinary account called its "general account" and also separated from the company's other segregated accounts (if any).

Initially used by insurance companies for a variety of purposes (including rent-a-captives and life and annuity companies) than by mutual fund companies to statutorily ring fence asset classes, these vehicles are now being used by a diverse range of businesses (including shipping companies and family offices) for multiple purposes.

The segregated account company has several advantages over traditional routes to creating legal divisions between accounts. It is considerably less expensive and less unwieldy than forming numerous subsidiary companies. In the fund context, you can establish a master feeder structure within a single corporate vehicle because an account within a segregated account company in Bermuda can invest in another account in the same structure, making it possible to invest and redeem without the capital leaving the company and creating a capital transfer. An added benefit is that these structures have now been extensively tested in our courts and the segregation concept upheld.

The other significant legislation to mention are the recent changes to our partnership laws which came into effect in March 2016. These changes have provided greater flexibility in terms of internal governance and structure. The most important changes to highlight are:

- The expansion and clarification of the safe harbour provisions applicable to limited partners serving on advisory boards or committees, making it clear that such activities do not constitute management;
- Clarification that limited partners serving on boards or committees owe no fiduciary duties to the limited partnerships or other partners unless expressly mandated by the partnership agreement;
- It is now possible for any existing limited partnership to elect to have separate legal personality and partnerships who have made that election have the option available to them to convert into companies or LLC's and vice versa; and
- The ability to change the jurisdiction in which the partnership is registered, without affecting the continuing existence of the partnerships is also possible through our continuance and discontinuance provisions.

Partnerships have always been popular for private equity strategies because of their familiarity and the flexibility they offer. There is no requirement for the general partner to be a Bermuda company and there are no prescribed service providers.

In addition to the foregoing, there are numerous additional developments which have an impact on the asset management industry in Bermuda, these include:

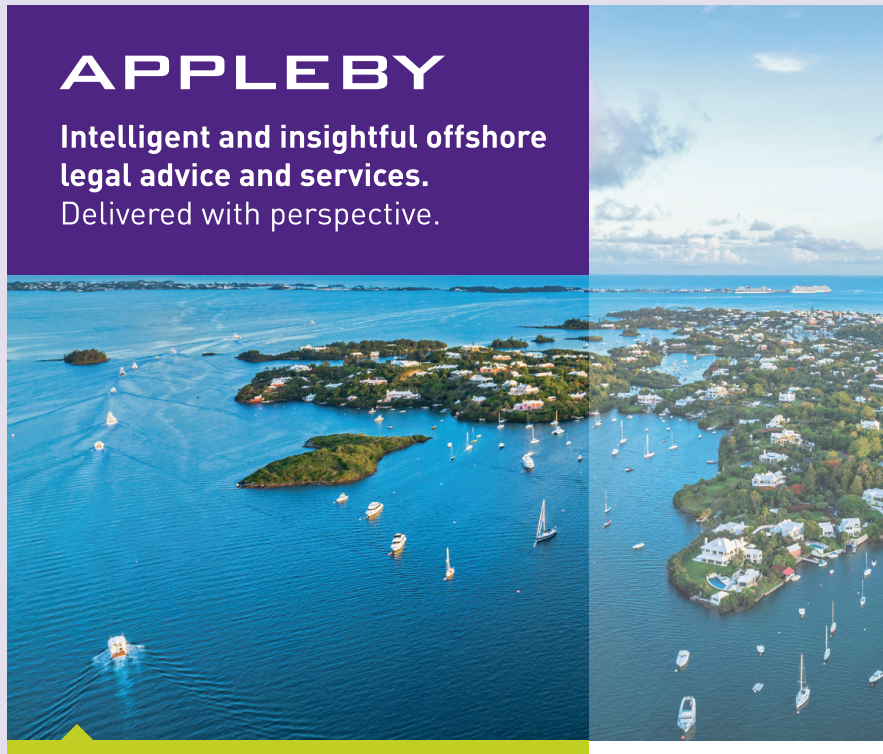
- Common Reporting Standard - Bermuda has adopted the Organisation for Economic Co-operation and Development's (OECD) standards for Base Erosion & Profit Shifting (BEPS) compliance for the automatic exchange of financial account information via Common Reporting Standard (CRS) and Country-by-Country reporting. The CRS initiative was introduced to improve the exchange of information on financial institutions between jurisdictions. Similar to FATCA, CRS requires financial institutions which are subject to the rules to report certain information in respect of account holders. All financial institutions resident in Bermuda are now required to, establish, implement and comply with procedures to fulfil their obligations under CRS.
- AIFMD - BMA has signed agreements with most European Union member states on the Alternative Investment Fund Managers Directive (AIFMD). Bermuda is awaiting a decision by the European Council and Parliament on whether passporting rights will be granted to alternative investment fund managers (AIFMs) operating in non-EU jurisdictions. If permitted, Bermuda-based AIFMs could market funds to European investors.
- Data Protection -Bermuda recently enacted legislation which will take effect in 2018 in connection with the protection of individual's personal information. In due course, funds will need to take advice to ensure that they comply with this new standard.

With our progressive legislative structure and well respected regulatory and business environment, Bermuda provides the ideal platform to innovate and partner with our clients to meet their ongoing and changing needs. *

*Tonesan Amissah is a Partner at Appleby (Bermuda) Limited
tamissah@applebyglobal.com*

APPLEBY

Intelligent and insightful offshore
legal advice and services.
Delivered with perspective.



Our Bermuda Funds and Investment Services practice comprises a team of lawyers with investment management and funds experience across all major markets and across all asset classes. To learn more, please contact:

Tonesan Amissah
Partner, Bermuda
+1 441 298 3201
tamissah@applebyglobal.com

applebyglobal.com