

Cayman Islands

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Cayman Islands: Weathering the storm

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With 75% of the world's hedge funds, the Cayman Islands is the market leader for the establishment of offshore funds and other financial services vehicles despite recent challenges in the form of the global international financial crisis, the ensuing political backlash, and the consequential international proposals for regulatory reform in the financial services sector. Developments within the jurisdiction in 2009 show how the Cayman Islands have met these fresh challenges and demonstrate the long-held innovative and flexible approach that has transformed Cayman into a first tier international financial centre over the past four decades.

Legal

The legal system of the Cayman Islands is based upon English common law, complemented by locally enacted statutes, Orders-in-Council and domestic case law. As a British overseas territory, the UK retains the power to legislate over certain affairs of the Cayman Islands; local principal statutes are approved by the Legislative Assembly of the Cayman Islands and brought into force on the assent of the UK Governor. A new Cayman Islands constitution came into force in 2009 which provides for increased scope of local legislative authority and introduces a Bill of Rights (which will come into force in 2012).

The Cayman Islands have an advanced court system and high-profile and complex commercial litigation takes place here. The 2009 establishment of a Financial Services Division (FSD) of the Cayman Islands Grand Court enhanced the Court's case management capabilities. FSD cases are assigned to specialist commercial judges within the FSD who will deal with a case from start to finish. Appeals are heard by the Cayman Islands

Court of Appeal with a further right of appeal to the Privy Council. Since 2006, a right of petition to the European Court of Human Rights (ECHR) has existed. In 2009 the first case from the Cayman Islands was heard by the ECHR.

Regulatory

The Cayman Islands has made it a policy to remain ahead of international regulatory reform, which has multiplied in the wake of the financial crisis. Cayman has already signed 16 tax information exchange agreements, most with prominent G20 or EU nations, a figure which is above the OECD threshold for inclusion on the White List of compliant countries.

A further signal of Cayman's attainment of international standards was its acceptance in 2009 as a full member of the International Organization of Securities Commissions (Iosco). Recently Cayman has also intervened in the debate over the EU's Alternative Investment Fund Managers directive. The Cayman Islands already meets or exceeds regulatory and transparency requirements for hedge fund jurisdictions, and the Islands' government has stated that it will seek to meet the directive's requirements enabling Cayman funds to gain the European passport.

New insolvency regime

In March 2009 Cayman introduced an entirely new insolvency regime which represented a significant enhancement of the Islands' legislative framework and brings onto the statute books established principles of cross-border insolvency. Key changes included the introduction of the concepts of fraudulent trading and shadow directors and the establishment of various tests for the provision of assistance and relief ancillary to liquidations of foreign companies.

Other new provisions mirror much of Uncitral's model law but fall short of introducing the Centre of Main Interest test adopted elsewhere. Interestingly, as of April 30 2010 there had already been three orders

recognising the standing of foreign liquidators and granting orders ancillary to foreign liquidations, notably with respect to the US trustee appointed in respect of the Bernard Madoff bankruptcy.

Case law

Several consequential cases were decided by Cayman courts in 2009. In HSH Nordbank the Grand Court dealt with the relationship between the Grand Court Rules (GCR) and the Companies Winding Up Rules (CWR), and found that the latter are essentially a Code and ought to be considered separately from the GCR (unless there is express provision to the contrary). Of particular note was the finding that, other than when dealing with questions of time, the Grand Court has no ability to waive the requirements of the CWR.

In the matter of Matador Investments the Grand Court considered the status of a redeeming unpaid investor in a fund where redemptions had been suspended, ultimately finding that whilst the fund had the right to suspend redemptions it did not have the right to suspend the payment of redemption proceeds if a redemption request had been made prior to any suspension of redemptions resolved upon by the directors. It is thus now clear that a fund cannot impose a retroactive suspension of redemptions.

In *TNT NV v Logispring* the Grand Court considered whether it was empowered to replace a liquidator of an exempted limited partnership. Key to the analysis was Logispring's limited partnership agreement (the LPA), and whether or not the LPA amounted to an agreement to exclude a limited partner's right to apply to the Court for a liquidator to be appointed and whether the LPA could override the jurisdiction of the Grand Court. The Court of Appeal, in construing the LPA, found that the power of the Court to replace the liquidator on the application of a partner was not excluded but that it had been open to explicitly do so. It therefore overturned the Grand Court's initial deci-

sion refusing an application to appoint a liquidator other than the general partner.

Outlook

The recent economic climate has provided the world's leading financial centres an environment of great uncertainty; the Cayman Islands is no different. What is certain is that regulatory changes will be effected in the leading onshore financial centres and the Cayman Islands will have to react quickly and in the spirit of cooperation. The Cayman Islands has already taken significant steps to reach out to its financial counterparts, demonstrated by the ongoing execution of TIEAs, and will continue to do so as part of the ongoing necessity of increasing the distance between the Islands' actual and proper role in the world's capital markets and the supposed tax haven image that persists in some corners.

Financial and corporate

Recommended firms	
Tier 1	Maples and Calder Walkers
Tier 2	Appleby Ogier
Tier 3	Campbells Conyers Dill & Pearman Mourant Ozannes Solomon Harris
Tier 4	Higgs & Johnson Stuarts Walker Hersant
Tier 5	Charles Adams Ritchie & Duckworth Turner & Roulstone

Investment funds

Recommended firms	
Tier 1	Maples and Calder Walkers
Tier 2	Appleby Ogier
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Tier 4	Charles Adams Ritchie & Duckworth Stuarts Walker Hersant Turner & Roulstone

Although the aftershocks of last year's global financial crisis are still apparent, there have been slow signs of improvement. "The economy in Cayman is in a state of repair," says one partner. "The British government has been working closely with Cayman to help with this repair." The Cayman government has a three-year plan with the British government to bring the islands' budget back to surplus.

Despite the economy being "patchy," lawyers have generally witnessed a rise in transactions. "Since the crisis things have really picked up," says one partner. The volume of work, however, has been nowhere near its pre-crisis levels. This has caused numerous law firms in the jurisdiction to make adjustments for redundancies and restructuring. "A lot of other firms are contracting quite significantly," says one partner.

In 2008 fund work was dominated by restructurings. The following year however was different as funds went into liquidation. The lack of market liquidity, resulting from the financial crisis, has stuck many fund managers with a growing portfolio of problematic assets. In cases where earning performance and capital levels were severely compromised fund managers opted to liquidate their funds.

Besides liquidations, the year also saw more fund consolidations and registrations. "Appetite for investment funds is returning on all levels," says one partner. "The funds market is looking up a bit." On the corporate side, lawyers reported an uptick in IPO and M&A work. Cayman saw significant changes in merger legislation in 2009 as mergers are now allowed to be conducted without going through a court process.

Investors have started to return as more cash has become available for them to invest.

"Banks have all the sudden been freeing up cash," says one partner. "We've been absolutely inundated with lending work. Banking has been absolutely rock solid here." Investors however are still erring on the side of caution with their investments. "Investors are looking for recognised brands," says one partner. This is one of the main reasons that start-up funds have been slow to gain traction in the market.

In terms of overseas investors, Brazil has played a large role in driving activity for the funds business. It was only as recently as 2007 and 2008 that new legislation was enacted to lift restrictions on investments to international funds in offshore jurisdictions like Cayman.

Appleby

Appleby's global network of offices makes it one of the premier firms in the region for cross-border work. The firm's addition of offices in Bahrain, Seychelles, and Isle of Man in 2009 has only increased its presence. Appleby's commitment to growth is also evidenced by having the most partners worldwide out of all the Cayman firms. With 74 partners across its offices, and 14 in its Cayman office, Appleby stands out among its competitors. The firm also hired on Julian Black and Richard Addlestone from Walkers in January 2010 to add to its roster of quality talent. "Appleby has a lot of new critical mass," says one peer.

The firm acted for the lender service provider Hatfield Philips International in connection with the capital restructuring of over \$1.6 billion in debt for the Four Seasons Healthcare group. The deal involved a large number of corporate structures in both Jersey and the Cayman Islands on behalf of the lenders and closed in October 2009 after more than a year of negotiations.

The firm also advised a consortium of private-equity firms in connection with the restructuring of more than \$5 billion in debt of River Group and Riverdeep Holdings by way of an exchange for equity in Education Media and Publishing Group.

Leading lawyers

Bryan Hunter
Stephen James
Simon Raftopoulos

Maples and Calder

Maples and Calder is the largest firm in the Cayman Islands with a corporate and funds practice that is among the best in the jurisdiction. In keeping pace with the global economy, the firm has built a network of offices overseas, including London, Hong Kong,

Ireland and Dubai, adding to its reputation for cross-border work.

Maples acted as counsel to C12 Capital Management and Protium Finance, an entity comprised of former Barclays employees, in setting up a new fund. The fund was financed with a loan of \$12.6 billion from Barclays and a \$450 million equity investment from third party investors which was used to purchase \$12.3 billion of illiquid assets from Barclays. Partners Alasdair Robertson and Mark Matthews helped Barclays even-out its cash flow and reduce its exposure to risky assets such as those linked to RMBS and CDOs. The deal's fundraising efforts closed in September 2009.

The firm also acted for the semiconductor company Auvitek International on its acquisition of Microtune. The two parties entered into a definitive agreement in early July 2009 whereby Auvitek would acquire Microtune for \$9 million in cash and stock. The deal was consummated at the end of the month and was the first corporate merger following the introduction of new provisions in the island's merger and consolidation laws.

Leading lawyers

Gareth Griffiths
Alasdair Robertson

Ogier

Ogier is an established offshore global offshore firm with particular expertise in corporate and commercial work, as well as investment funds. In terms of its funds practice one peer says, "Ogier is giving Maples and Walkers a run for their money."

The firm's relationships with international financial institutions, professional advisors and regulatory authorities make it a competitive player in the market. Ogier offers Cayman legal services abroad in Hong Kong and London and plans to offer it in Bahrain as well in 2010.

In 2009, Ogier acted for the Canadian gold mining company Kinross Gold in connection with the restructuring of the ownership of the Cerro Casale project in Chile. As a result of the restructuring Kinross and Barrick Gold Corporation each gained a 50% interest in a Cayman Islands-exempted company which holds shares of Chilean company involved in the project.

The following year Ogier advised Kinross on its sale of one-half of its interest in the Cerro Casale project to Barrick. After the sale, Kinross was given 25% indirect ownership in the project while Barrick got 75% in indirect ownership. Led by partner Peter Cockhill, the transaction involved amending the shareholders agreement for both the Cayman and

Chilean companies holding interests in the Cerro Casale project as well as the articles of the Cayman company. The total value of the deal with respect to Kinross' 25% in the project was approximately \$474 million.

Leading lawyers

James Bagnall
James Bergstrom
Peter Cockhill
Angus Davison
Giorgio Subiotto

Walkers

Walkers is highly regarded in Cayman as one of the top law firms in the jurisdiction. The firm has expertise in corporate finance and investment funds work which attracts clients from across the globe. It has a strong international presence with offices in Cayman, BVI, Hong Kong, Singapore, Jersey, the US, and UK, which gives the firm an edge against competitors on cross-border transactions.

Walkers this year advised Brazilian energy company Petrobras \$4 billion bond issuance in connection with its Cayman incorporated financing subsidiary. The transaction was led by Philip Paschalides and closed in October 2009. This is the largest ever bond issue of a Brazilian company to date. "Philip is very highly regarded," says a peer of Paschalides.

The firm also acted as Cayman counsel to HSBC, the underwriter and bookrunner in the government of the Cayman Islands' \$312 million note offering. The ten-year notes were listed on the Cayman Islands Stock Exchange as well as the London Stock Exchange, making this the first public offering by the Cayman Islands government on the international bond market.

On the funds side, the firm is acting for Blackrock in connection with its Cayman Islands funds. Led by Ingrid Pierce, the group has been counselling the New York-based investment management firm on its establishment of new fund structures, the restructuring of certain funds and corporate governance issues.

Leading lawyers

Philip Millward
Philip Paschalides
Ingrid Pierce
Caroline Williams

Other ranked firms

Conyers Dill & Pearman opened in Cayman as recently as 2003 and yet has grown to have a considerable presence in the Caymans. Its lawyers advise on corporate finance and investment fund transactions and have an

expertise in the laws of various jurisdictions including Cayman, BVI, Bermuda, Cyprus, and Mauritius. Coupled with the firm's offices in abroad in Asia, Brazil, Russia, the Middle East and the UK, Conyers is a strong choice for clients looking for cross-border counsel.

Conyers provided Cayman Islands counsel to International Submarine Engineering (ISE) in connection with a merger resulting in a Cayman Islands holding company listed on the Toronto Stock Exchange. This is the second Cayman IPO on the TSX. The transaction was led by Kevin Butler and closed in February 2010 for C\$20 million (\$19.3 million).

Leading lawyers: Kevin Butler and Richard Finlay

As of January 2010, Higgs Johnson Truman Bodden & Co underwent a name after the departure of founding partner Truman Bodden. The firm's new official name is **Higgs & Johnson**. Despite the departure of Truman Bodden, the firm still maintains its commitment to expanding and strengthening its relationships with clients.

During 2009, the firm advised a Canadian banking group on its establishment of a Cayman incorporated open-ended investment firm. It also assisted the banking group on listing the fund on the Cayman Stock Exchange. The financial details of the deal are undisclosed.

Leading lawyers: Carolyn Vivian and Benjamin Wrench

Mourant Ozannes has stepped up in both the financial & corporate and investment funds rankings. The firm's offshore presence got a serious boost through the merger of Mourant du Feu & Jeune and Ozannes in June 2010. Mourant Ozannes is now the third largest offshore firm in the world.

The firm was particularly praised by peers for its funds practice. Under the leadership of former Skadden lawyer Neal Lomax, the funds and corporate & finance practices in the firm have thrived, and in December 2009, the firm expanded again with the recruitment of James Wauchope from Maples and Calder.

One highlight this year saw Mourant act as Cayman counsel to Roc Capital Management in connection with the establishment and launch of its new master-feeder fund. The transaction closed in July 2009 with approximately \$1 billion in assets under management. This was the largest start up fund in 2009.

The firm also served as Cayman counsel for Steel Partners, a \$1.2 billion hedge fund, on the high-profile restructuring of its flagship fund. The transaction was led by Neal Lomax and closed in November 2009.

Leading lawyers: Richard de Basto, Neal Lomax and James Wauchope.