

Five key messages on the "Domicile Dilemma" for the alternative investment funds industry

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In the last few years we have seen global regulatory reforms, new structuring options and shifts in market trends that have changed the landscape for the alternative investment fund industry, creating a "Domicile Dilemma" for managers.

Ogier Investment Funds partner Kate Hodson, who organised a recent panel discussion on domicile options for funds professionals, says that with so many changes taking place, it's time for investment managers and funds lawyers to take stock and give a fresh look to the options available for Asian managers, particularly those looking to raise capital in Europe.

Kate says the five key takeaway messages for practitioners are as follows:

In Asia, Cayman remains the default option – but other jurisdictions are upping the ante and providing competitive alternatives. Ultimately, everyone knows that the Cayman option works, and new features such as the LLC law and enhanced corporate governance requirements means that it remains the leader of the pack in Asia. However, when we look at this from a global perspective there are obviously other large players, such as Delaware, Luxembourg and Ireland. Ireland has a solid footing in the credit, capital markets and hedge fund space but when it comes to PE it lags behind Luxembourg with its partnership law being outdated and in need of some modernization. When we looked at the "mid-shore" options in Asia, it was considered that Hong Kong does not yet provide a workable solution (at least one that can be of broad application) for domiciling PE funds in Hong Kong – the tax and legal infrastructure is not yet there although there is a demand for this to be put in place. Singapore has been active in cultivating this market and has introduced a number of new products over the last few years which has resulted in some movement – although this tends to be most applicable where there is an actual presence in Singapore. For the most part we are still typically seeing GPs using a Cayman domiciled feeder fund for marketing to investors but this may feed into a Singapore master fund to take advantage of Singapore's strong DTA network (at least where there is real substance in Singapore). BVI has to date not been as successful as Cayman with its rather out of

date partnership law, however we are seeing a strong demand for BVI partnership structures out of China and with a number of legislative changes in the pipeline (including to the Partnership Act), we expect BVI to become more competitive as a domicile for private equity funds.

The Luxembourg option takes some adapting to for Asian managers – but it's worth it.

Luxembourg is the domicile of choice when it comes to PE, infrastructure and real estate investment funds with a European focus – and with Asian managers increasingly looking to Europe to raise funds, it's becoming an increasingly attractive option, albeit there has been some pain in adapting to the regulatory model. A practical example cited was the requirement to work with the Lux office of the auditor rather than being able to see this role delegated to the local office where the manager is based and with whom the manager may be used to working. There are also higher costs involved than say a Cayman structure. However, where large/institutional European investors are involved, they are likely to request a Luxembourg structure and recent adaptations in the fund products available in Luxembourg (such as the RAIF) has assisted the transition to a European domicile and allowed for a faster time to market than was previously the case. Ogier is starting to see more and more enquiries from Asian fund clients looking to set-up Luxembourg structures for the first time.

The National Private Placement Regime route is holding up well – but there's growing uncertainty about passports. There's still no delivery date on the AIFMD passport for countries outside of the EU despite the positive ESMA verdict almost a year ago for Guernsey and Jersey, and the delay to the Cayman verdict pending legislative amendments. Although the NPPR route is tried, tested and familiar, it does have a shelf-life (although we know it will last until at least 2018) – and there is now uncertainty about whether the passport is coming at all, an issue of particular relevance to non-EU structures.

Parallel fund structures add complication – but it's a fairer fit. Parallel fund structures may be more difficult to manage, but it's a fairer solution to allocating costs than landing Asian investors with more expensive European structures and regulatory requirements. This option is gaining popularity and traction. Essentially this allows the manager to stick with its tried and tested domicile for marketing to investors outside of Europe (where traditionally they have been using non-regulated products) but provides smoother access to target European investors. The developments in Luxembourg law since 2013 have allowed for managers to develop Luxembourg structures which can mirror the documentation of the parallel Cayman fund in most cases. In particular the modernisation of regulations on partnerships and the introduction of the "special limited partnership" (which is largely inspired by the best of breed of anglo-american partnership legislation) provides the required tool to match investors and promoters' expectations and has proven to be very popular already.

The uncertainty over Brexit is not helpful – but Guernsey and Jersey are benefitting. The continued uncertainty created by Britain's departure from the EU hangs over the City of

London, so it's good news that there are two established, British centres with a track-record as "third countries" in the GMT timezone. Guernsey and Jersey have not been standing still, with the developments of Private Fund regimes and Manager-led Products, and a healthy competitive attitude on fees and costs. Significant growth in the net asset value of funds under management in both jurisdictions tells its own story, and consistent investment in Jersey's infrastructure in particular demonstrates an ambition and commitment to growth.

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