DIVERSITY
Choice of traditional and alternative distribution hubs

INVESTMENT
Offshore jurisdictions provide opportunities for growth

REGULATION
Proactive regulators ensure regulatory compliance
With long-standing, solid regulatory standards and a position of transparency and cooperation, Bermuda has become a world-leading jurisdiction in the financial services sector. Bermuda’s extensive TIEA network and our position as Vice Chair of the OECD Global Forum are testament to our robust and effective regulatory policies. Bermuda is a prudent and profitable place to do business.

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It is still a challenging time for fund managers. However, it is also a time of opportunity. This is particularly so for investors seeking exposure to some of the emerging markets and, for anyone who has listened to Sir Bob Geldof speak about his 8 Mile Fund, which is focused on investment into the African continent, Africa certainly falls into that category.

Managers in the Mena region are also fortunate in that they may be able to escape much of the regulation that is complicating life for US and European managers and also managers with substantial exposure to those markets, either in terms of investments or investors.

Mena managers are also less likely to be cursed with zombie managers who are managing funds that have performed poorly and who know they will not be able to raise a second fund.

It appears that what will set apart private equity and venture capital managers over this next period is their ability to generate genuine operational value within portfolio companies rather than by way of financial engineering. This is the cult of the specialist, which, in my view at least, is refreshing.

There are two further pressures on managers. The first is more specific to private equity and venture capital managers and it is the availability of exit opportunities. With the capital markets partially frozen, and notwithstanding signs of a slight thaw in recent times, getting an exit on the right terms is still challenging. Again, the opportunities presented in the Mena region might buck this trend.

The final challenge is fund raising. The stories from the frontline suggest it is very hard work unless you have good cornerstone or follow up investors and an excellent track record. Even for managers meeting these criteria, it is a longer process, and usually results in a lower than hoped for fund raising. There are, however, exceptions to this and Turkish managers are one example of success amidst the gloom.

The offshore, with its flexibility, its ability to have both regulated and unregulated structures and its attractiveness as a domicile for vehicles for initial public offerings, is critical to the fund industry. Whether you are seeking to raise an African focused fund and taking advantage of the benefits of Mauritius, or are seeking the ease of business and global recognition of the Cayman Islands, BVI, Luxembourg and Malta, or the regulatory safety and reputation of Guernsey, Jersey and the Isle of Man, you will find the appropriate domicile for your fund, manager and carry structure.
Exceptional Growth for Malta’s Fund Industry

The number of collective investment schemes increased from 200 in 2006 to 519 in June 2011.

This success was made possible by Malta’s highly favourable business environment. This includes the role played by the island’s Single Regulator, renowned throughout the industry for its flexibility coupled with meticulous attention to detail.

The island’s highly competitive, cost-effective business environment and the presence of all the Big Four accounting firms adds even further advantage.

An onshore EU jurisdiction allowing passporting and redomiciliation of funds, with an efficient fiscal regime, a balmy Mediterranean climate and a multilingual, ethical and professional workforce, Malta offers a winning combination of advantages specifically designed to foster further growth and maximise success.

more information on:
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The right balance

Barney Lee of Appleby Guernsey talks to Mena Fund Manager about the continuing evolution of Guernsey’s funds industry as recognition of its high value input from industry experts

Guernsey, as a fund domicile, has three main strengths, and in some ways the first is a consequence of the second two:

1. Guernsey has an excellent reputation; 2. Guernsey is a pragmatic jurisdiction both in terms of regulation and otherwise; and 3. Guernsey is a domicile of quality both in terms of service providers and the type of managers doing business here.

In terms of reputation, this can be translated into maintaining just the right balance between those less-regulated jurisdictions and a jurisdiction that has a far higher regulatory burden, such as Luxembourg. The consequence of this is that Guernsey is often seen as the model which is a compromise between two ends of the scale. Often, European investors, particularly institutional investors, want a regulated environment and managers are looking for an environment that is well regulated but flexible. This is where Guernsey fits the needs of both investors and managers.

Another attraction for fund managers is that it is the premium destination for listed funds. There are more Guernsey-domiciled investment vehicles listed on the various markets of the London Stock Exchange than from any other jurisdiction.

The Guernsey offering

Guernsey has limited partnership structures which are mostly used by private equity, venture capital and infrastructure funds. It has protected cell and incorporated cell companies and was in fact the first jurisdiction to legislate for protected cell companies, so it’s certainly the leader in that respect. Cell companies are usually used to run different types of open-ended strategies in different cells. Risks as between cells are segregated but, it is a cost-effective and efficient way of setting up a multi-fund platform. Unit trusts can also be used for this purpose, but they are most commonly used as part of a property structure available for allocation in the alternatives sector. European regulatory changes are influencing the choices of insurance and pension managers in respect of asset allocation who may be forced to move, at least in part, away from alternatives. However, given the returns available (not to mention the risk) in respect of government bonds and equity markets, alternative assets will continue to have an important role to play. It is identifying how that will play out which will be interesting.

“Often, European investors want a regulated environment and managers are looking for an environment that is well regulated but flexible. Guernsey fits the needs of both investors and managers”
risdiction suits the needs of a particular client based on their target investors, their asset class, track record and other commercial drivers. Another positive of Appleby’s global presence is that because we see what happens across the whole offshore funds sector, we have access to trends and developments in each jurisdiction which can then be brought across to the others. This allows us to identify and implement initiatives across all our jurisdictions as soon as they are seen offshore. We have seen that, in particular or with some of the more interesting insurance linked structures as well as in private equity and venture capital.

Guernsey is known for quality and is a centre of excellence in terms of fund servicing. The jurisdiction has a global name in providing investment management, custody, administration, accounting and legal services to the funds sector. Managers looking to domicile an onshore or offshore structure in Guernsey are able to gain access to best-in-class service providers. For example, if a manager is looking at an investment trust domiciled in the UK, it could also consider a Guernsey-incorporated but UK-domiciled investment trust, which gives the same tax benefits, but offers greater flexibility from a corporate perspective.

Regulation
In terms of domestic regulation there is nothing substantial on the horizon likely to impact the jurisdiction. We are updating our Class B rules which are for open-ended funds, and obviously we are watching closely what is happening with the Alternative Investment Fund Managers (AIFM) Directive. We have delegates representing us in Brussels who are putting across an offshore perspective. It may be that when the AIFM Directive is introduced, Guernsey will need to introduce an AIFM Directive-compliant regime but, again, to the extent that is required, Guernsey is already a well-regulated jurisdiction and the adjustments required to put in place a parallel AIFM Directive-compliant regime would be minimal.

Looking ahead
The fund industry has seen positive changes in Guernsey in the past five years. This trend, which began 10 or 15 years ago but which has accelerated over the past five years, has seen global investment managers and small boutique investment managers choosing to domicile not just their funds, but also management structures, in Guernsey. For example, BlueCrest, B C Partners, Permira, Cinen, Partners Group and Terra Firma have all set up offices in Guernsey to run their funds. This obviously increases the expertise available in Guernsey in that there are some really high-level individuals who have moved to the island, who are carrying out fund management activities here and are actively involved in the Guernsey fund industry, adding value that can only strengthen the jurisdiction.

The most obvious participants within the Guernsey funds industry are those who have a high profile such as Jon Moulton and Guy Hands. However, there are a number of very clever people who have moved to the island more recently who operate under the radar but are no less effective.
Luxembourg, in spite of the financial turmoil, has lost none of its dynamism as the funds marketplace of reference in Europe, with an increase in assets under collective management of €266bn between 2008 and 2011.

Luxembourg has maintained a leading position in the funds industry since becoming the first member state in 1988 to implement the Ucits Directive. It has created a supportive environment for the deployment of the possibilities offered by this EU regulatory framework, while cultivating its historically unique wealth management industry.

1. A robust investment fund industry and efficient regulatory framework duly recognised beyond European borders

The Luxembourg jurisdiction has built its reputation as one of the largest financial centres for funds with a Ucits label. For a long time, Luxembourg has been the leading jurisdiction for cross border Ucits distribution. However, the fund distribution activities also extend to a wide range of alternative types of funds, whether local or not, which have retained Luxembourg as their global distribution hub allowing all orders to be collected, globalised and re-routed from there. This creates the significant advantage where all of this can happen from a single point where their distribution network is administered.

As of today, the enormous success of Luxembourg Ucits can be measured by their lead position in foreign retail funds distributed in the main Asian countries, Latin America and in the Middle East.

But let’s not forget that Luxembourg is also a country of excellence for alternative asset management. Having had a long history in servicing off-shore vehicles, the creation of the SIF (Specialised Investment Funds) regime in 2007 has resulted in many fund managers’ interests shifting to Luxembourg-based vehicles. The SIF framework offers a unique combination of flexibility in terms of authorised investment strategies and a high level of investor protection.

“Luxembourg is also a country of excellence for alternative asset management”

Supported by a regulator who is well in tune with the stakes of the evolving needs of the industry, the SIF regime encountered a spectacular success, which has never wavered, and the legislator has been proactive in modernising its framework (mainly due to lessons learnt from the recent crisis) by anticipating measures contained in the Alternative Investment Fund Managers (AIFM) Directive.

As of January 2012, 1,419 SIFs have been launched to carry out all types of alternative investment strategies. Further, as a result of the Ucits III reform in 2003, which broadened the scope of eligible investments under the Ucits brand, Ucits are being increasingly used by institutional investors to implement hedge fund-like strategies. So called “Structured Ucits” are highly valued by institutions that use these products to achieve dynamic returns derived from long/short, 130/30, event driven and market neutral policies, through investments that meet the applicable constraints.

In addition to SIFs and Ucits, the Luxembourg framework provides a range of other types of investment vehicles customised for specific needs. This includes the Securitisation vehicle, which offers an efficient regime for securitisation operations, as well as the SICAR (Société d’Investissement à Capital Risque), which has been specifically designed for venture capital strategies. Non-regulated vehicles such as the “Société de participation financière” (Soparfi) are also commonly used for typical closed-ended investment projects.

All of these regimes can be defined in varied legal forms. Among the most utilised are the Sicav/Sicaf (Corporate type), the FCP (Contractual fund) or the limited partnership, a corporate form offering many benefits for the implementation of private equity/real estate and other infrastructure strategies, hence enabling managers to choose the best suited set up, both from a governance and tax standpoint.

Last but not least, the Luxembourg stock exchange represents one of the most dynamic and pragmatic environments in the world. It has around 400 listings of collective investments from all over the globe and these have benefited from the highly reactive and reliable trading platform. It has also provided support to the development of Exchange Traded Funds (ETFs) over the last few years.
2. Efficient tax environment for optimised investment structuring

The success of the Luxembourg fund industry is strongly supported by a flexible and attractive tax environment.

At fund level, Luxembourg allows the use of various types of collective investment schemes, which offer alternative tax treatments permitting to achieve tax neutrality, both from an income tax and VAT perspective.

Furthermore, benefiting from its well established international dimension, Luxembourg enjoys an extended network of 67 double tax treaties. These double tax treaties are applicable to Soparfi’s and should also apply to specific types of vehicles like the SICAR and securitisation vehicles. Some of them do also apply to other types of corporate funds (SICAV/ SICAF).

Under certain circumstances, investors in fund vehicles of the contractual type (FCP) may opt for fund transparency; this will enable them to take advantage of the double tax treaties between their country of residence and the country of investment of the fund.

However, funds quite often suffer local withholdings, capital gain and other taxes on their incomes. Therefore, a combination of a Luxembourg fund and a Soparfi using adequate financing instruments may allow investments made by the fund without suffering any (major) fiscal charge.

Highly specialised advisors are able to access a huge array of domestic private banking tools. SIFs are common vehicles used to provide holistic tax efficient structuring. Furthermore, with the creation of the SPF vehicle ("Family Wealth Management Company") in 2007, Luxembourg offers a simple and flexible investment vehicle specially designed for individuals to manage their wealth and have their tax optimised for more complex requirements.

Since 1994, Luxembourg’s life insurance framework has emerged as a second pillar of Luxembourg wealth management complementing the traditional private banking industry.

The Luxembourg life insurance framework distinguishes itself from other European regimes by allowing for uniquely adaptable investment structuring through dedicated insurance funds that can answer any type of clients needs, while also offering an unrivalled asset protection regime through a set of specific control and segregation rules guaranteeing clients against their insurer’s default.

These advantages, combined with the often favourable national tax and inheritance law treatment, can generally be made available to an extended panel of clients world wide and throughout Europe thanks to the EU Freedom of Services regime under the 2002/93/EC Life Directive. Due to the dedicated insurance funds’ open investment architecture, the life insurance route is an interesting tool for alternative fund managers willing to gain exposure to a wider market.

This trend is likely to be further optimised thanks, notably, to the forthcoming EU IMD reform that is intended to remove a series of barriers to cross border distribution of life insurance products within the EU.

In conclusion, Luxembourg’s position in the heart of Europe gives it a natural openness to servicing asset managers on an international dimension, both in terms of investment and distribution strategies, using the varied channels of the fund distribution and of the dedicated wealth management solutions.

The AIFM Directive, as well as other ongoing developments affecting the insurance sector, will mean new challenges but will also bring greater opportunities for fund managers.

The focused attention of Luxembourg on development opportunities will make it even more desirable as a place of choice for fund managers to leverage their international ambitions and projects.

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The case for Luxembourg

Pierre Cimino of CACEIS explains why Luxembourg is a highly competent solutions centre for the global fund industry

The Grand Duchy is Europe’s leading investment fund centre and is well known as the back office of the European mutual fund industry. However, as Pierre Cimino explains, Luxembourg has evolved far beyond a simple back office for mutual funds. Today, it has developed the skills and servicing infrastructure to support the entire investment management community across the globe.

An international funds hub
Luxembourg’s success as a jurisdiction is mostly down to its government’s commitment to becoming Europe’s premier domicile for funds. It has attracted a vast array of international fund promoters and amassed significant expertise in financial services as well as an exceptional concentration of expert service providers with considerable depth of expertise in custody, fund administration and transfer agency, and other players such as business and tax consultants, audit firms, international and local law firms and fund data providers. It can draw on a highly qualified international employment pool that enables companies to service clients in their own language, which is one of the many factors in promoters decision to select Luxembourg as the hub for their international business.

The Grand Duchy earned a considerable first starter advantage in implementing the Ucits directives, which permitted promoters to distribute a single fund range throughout the EU from a Luxembourg hub. The country has held onto that lead, becoming the leading centre for initially European and then globally distributed funds, and along with traditional investments it has also grown as a primary centre for alternative investments.

The development of a highly specialised service provider community to support complex internationally invested and distributed funds is key. Although Luxembourg is positioned as a back office specialist, the Ucits III requirements on substance and governance have led its service providers and management companies to enhance their risk management and distribution reporting capabilities. Under Ucits IV, which favours efficiency through fund range restructuring, Luxembourg’s expertise in handling the back office will see it gain a significant advantage over rival European jurisdictions.

Servicing competence
Fund promoters are facing downward pressure on revenues from market forces such as direct sales through fund supermarkets and competition from low cost products such as ETFs, and as the competitive environment increases, they also need to differentiate and customise their investment products to attract new capital. Luxembourg understands the funds market, and has evolved a range of effective support services to cater to fund promoters’, asset managers’ and distributors’ growing needs for investment efficiency and tailoring.

Fund administration
Luxembourg’s asset servicing community have developed a number of distinct solutions to address these needs, such as umbrella funds that permit differing investment policies to be run in separate compartments under one legal entity, or an umbrella structure that can also accommodate an unlimited number of share classes within the entire fund or individual compartment. Another efficient service is fund pooling which allows common assets to be consolidated on an accounting level and managed as efficient pots, despite being spread across compartments or legal entities and being tailored to specific investor profiles. These, together with master-feeders, cross sub-fund portfolios and multi-manager portfolios are just some of the solutions that servicing providers can offer to assist their clients in running a customised range of investments in a cost effective manner.

Cross-border distribution support
As an ever increasing number of fund promoters look beyond their local markets for opportunities in the new distribution markets of Asia and Latin America, Luxembourg has placed a greater emphasis on developing global fund distribution support services. With the ability to pool expertise and spread the costs of development over multiple clients, Luxembourg providers offer services that enable promoters to outsource initial fund registration, registration up-keep, distribution network management and related services such as trailer fee calculation and...
payment. Service providers can also handle the complex question of local tax reporting, such as German Zwischenrechnung and Luxembourg reporting.

Monitoring and managing risks
One of the central principles of the Ucits regulations, which plays an important part in Ucits success in foreign markets, is the establishment of a robust risk management framework. The management of risks falls under the responsibility of the Ucits management company but can be delegated to a service provider with the necessary expertise to monitor all types of risk to which an investment fund is exposed, ensuring a stable and safe product for investors. Luxembourg’s expertise in risk management, combined with the ability to handle the administrative needs of complex daily-priced products, has seen it rise as the leading centre for alternative Ucits products.

Alternative investment services
Despite its more cautious début in the world of alternative investments, Luxembourg has a regulatory framework that has enabled it to attract alternative investment managers from across the globe. The SICAR and SIF structures it offers have proved successful vehicles for private equity, real estate and fund of hedge fund investments, and Luxembourg’s administrators have been quick to develop the expertise, technical infrastructure and services required to perform high quality accounting of alternative funds, as well as middle office services such as performance and risk analytics reporting.

Trends in asset servicing
Today, one of the principal issues providers face is the wave of new regulation and laws brought in over the past years, as regulators and governments attempted to calm turmoil on the markets. Regulations have been coming from all angles, such as the cross-border EUSD, the US FATCA, and new local regulations such as the tax rules in Germany. Providers have been dedicating vast resources to ensure their clients comply with these regulations, however smaller boutique administrators have found the burden excessive and many have had to become part of larger organisations.

“Luxembourg has the technical systems to provide effective distribution support on a global basis”

Competition between asset servicing firms has increased steadily in recent years, particularly for Luxembourg-domiciled funds, and many of the larger servicing organisations have set up offices in jurisdictions further afield to support their clients’ global distribution objectives. Asset managers are constantly looking for distribution opportunities in new markets like Asia and Latin America, and Luxembourg’s asset servicing providers have the experience that makes them a key partner in their clients’ global fund distribution objectives. Playing an extended role in asset managers’ global business development, means a provider must understand the local tax situation, local product regulations and even local distribution channels of many countries, in order to provide effective support.

This deepening partnership is also evident in the current middle-office outsourcing trend, where the reputation of the promoter and its products depend to a great extent on the quality of service. The service provider performs such sensitive aspects of its clients’ business, and is such a key part of the value chain, that despite fears of a trend reversal post crisis, the growth in outsourcing relationships based on trust has continued unabated.

In terms of product trends, there is a growing convergence between mutual fund markets and alternative fund markets, which was accelerated by the intense focus on hedge funds’ role in the crisis. The combination of investors becoming increasingly risk averse, and regulations becoming increasingly restrictive, has led hedge fund promoters to consider more regulated structures like Ucits for their strategies, in order to capture new capital inflows. This trend sits well with Luxembourg’s fund structuring and complex fund administration expertise, and will see the proportion of alternative assets the Grand Duchy holds, rise significantly.

Selecting a jurisdiction
By far the most important consideration for a fund promoter when selecting a distribution hub for investment funds, is the level of expertise a jurisdiction can offer in terms of assisting the global distribution of those products. This is Luxembourg’s big advantage, as it has the experience and the technical systems to provide effective distribution support on a global basis, while being able to handle all other aspects of asset servicing professionally and efficiently.

However, a presence in Luxembourg does not satisfy all of a promoter’s needs, and today an asset servicing partner must be able to combine the advantages of Luxembourg, with those of Dublin, other European jurisdictions and Asian jurisdictions, and it is only the large global service providers like CACEIS that are able to do this. With our global operating model, clients have the support of our local service experts as well as our global centres of excellence. It is essential that asset managers select a provider that makes all options available to them.
Slowly but surely

Malcolm Moller of Appleby talks to Mena FM about why fund managers are increasingly looking to Mauritius to domicile their funds

The offshore funds market in Mauritius has grown dramatically in recent years and is continuing to gain pace. Malcolm Moller, managing partner at Appleby, Mauritius and Seychelles, tells Mena FM why Appleby’s funds lawyers are at the forefront of this development.

Mena Fund Manager (MFM): What are the strengths of Mauritius and how does that translate into fund formation in the jurisdiction?

Malcolm Moller (MM): Mauritius’ statute law on Collective Investment Schemes is contained in the Securities Act 2005 (the “Securities Act”). The Financial Services Commission (the “Commission”) has, since its coming into existence in 2001, developed a very flexible set of guidelines for the regulation of collective investment schemes in Mauritius, adopting what it considers “industry best practices” from various long established and well regarded jurisdictions. This has, over the years, resulted in more than 400 investment funds having been incorporated in Mauritius and assets in excess of $35bn being managed from within Mauritius.

For the past decade, the global business industry in Mauritius has been quite active mainly for inbound investment into India, Africa and China. Since the double taxation treaty between Mauritius and India is more favourable as compared to other jurisdictions, Mauritius has become number one in providing foreign direct investment in India. As a result, many investment and/or hedge funds (mainly European domiciled investors from jurisdictions such as Luxembourg), commonly known as investment companies, were incorporated in Mauritius for the purpose of investment in India.

MFM: What structures are currently available in Mauritius and what part of the funds industry uses those structures?

MM: Global funds or Collective Investments Schemes (CIS) registered with the Commission in Mauritius are commonly structured as companies incorporated under the Companies Act 2001 and licensed as a company holding a Category 1 Global Business Licence. Such a structure, referred to as an investment company, is defined as one where the company’s business consists of investing its funds mainly in securities with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds.

An investment company/CIS can take the form of:

1. A close-ended company, which has a fixed share capital. Investors do not have the right to call for their shares to be redeemed at net asset value by the company. A close-ended company can be listed on the stock exchange, enabling investors to buy and sell shares in the market, thereby preventing any lock in. The company may be formed with a limited life, after which the assets are distributed to investors on winding up.

2. An open-ended company, which has a variable share capital. Investors are allowed to redeem their shares at net asset value at pre-determined times in accordance with the articles of association.

Furthermore, it is possible to constitute an umbrella fund under each of the foregoing structures. The umbrella fund will comprise two or more sub-funds and investors subscribe for shares or units in specific sub-funds. Each sub-fund has its own investment policy with segregated assets and accounting records. Investors can switch their investment from one sub-fund to another without redeeming their shares or units.

A Mauritian investment company can also be set up as one of the sub-funds of an umbrella fund not established in Mauritius.

“Mauritius has become number one in providing foreign direct investment in India”

MFM: What will be the most significant change in Mauritius in the next
12 months and how will this affect the fund industry?

MM: The introductions in the Indian Budget, such as General Anti Avoidance Rules (GAAR) and taxation of indirect transfer of shares, have created concerns among the international investing community. For example, trade groups representing more than 250,000 companies have written to the Indian Prime Minister Manmohan Singh stating that his government’s new retrospective tax proposals have led foreign businesses to reconsider their investments in the country. Also, the UK’s Finance Minister George Osborne also raised his concerns over the issue with his Indian counterpart. Our government is actively engaged in dialogue with the respected bodies in Mauritius for making needful representations to Indian counterparts for gaining ample clarity on these provisions. At this juncture we are hopeful that such voices will be taken into consideration while forming out a final rule of law.

MFM: How does Appleby’s global presence add value to the service it offers fund managers in Mauritius?

MM: Our funds and investment services team advises clients on a wide range of services in relation to hedge funds, mutual funds, other collective investment schemes and a variety of financial products. Appleby has a dedicated and responsive team of investment funds lawyers who are able to draw upon the skills of our global capabilities such as capital markets, structured finance and insurance teams to provide advice on a full range of innovative investment products.

MFM: What benefits does the domicile offer those managers domiciling Ucits and other onshore structures on the island?

MM: A company holding a Category 1 Global Business Licence for fund business in Mauritius is liable to Mauritian taxation at a rate of 15% but after application of the provisions on foreign tax credit, the rate may be reduced to 3% or zero. Funds that are centrally controlled and managed in Mauritius can, with the approval of the Commissioner of Income Tax, accede to the benefits of Double Taxation Agreements. Furthermore, it should be noted that there is no withholding tax on dividends, capital gains and interests.

Mauritius’ membership in the World Trade Organisation, the Common Market for Eastern and Southern Africa and the Southern African Development Community, provides the jurisdiction with the effective commercial and legal infrastructure required to support the development of a global business network.

The jurisdiction is party to more than 30 double taxation agreements, and now has more than 30,000 global business company registrations and 460 registered global funds with a net asset value in excess of $35bn.

MFM: What developments are on the horizon for Mauritius with regard to regulation and otherwise?

MM: The enactment of the Mauritius Limited Liability Partnerships Act 2011 (“the LPA Act”), which came into effect on 15 December 2011, introduced a Mauritian legal entity, the Limited Liability Partnership (“LP”). This aimed to give local and international businesses a further choice when selecting the structure that best suited their needs. The LP structure has many advantages. LPs are legal persons distinct from their members. This means LPs, in their own names, can enter into contracts, own property, sue and be sued. There is enormous flexibility in the structure of an LP. Unlike a company, where many matters are laid down by statute, the constitution and governance of an LP are set out in the partnership agreement. This flexibility means that the LP partners are free to choose the structure which works best for them.

MFM: What will the domicile’s fund industry look like in 5 years’ time?

MM: While the growth will be slow, it will at least be positive provided that interest rate policy in the US remains accommodative, trends that should be “good enough” for risk assets.
Baker & McKenzie Luxembourg

Baker & McKenzie is one of the world’s largest law firms, with a solid service platform spanning 42 countries. Our collective capability and success in handling complex international deals have made us counsel of choice among multinationals and financial sector clients with global needs.

Luxembourg is a major private banking centre in Europe and a key place in the world for investment funds. Many of our global clients in the corporate and financial sectors have entities or funds registered in Luxembourg. Our Luxembourg team helps our clients in every aspect of their business.

Our lawyers have a wide expertise in Funds & Asset Management and a strong knowledge of the specific needs of the market. We offer to domestic and foreign investors, to fund promoters as well as to other providers of financial services a full range of legal and tax services, both in relation to regulated and unregulated investment vehicles.
Among the various offshore islands, one of the stand-up features of Jersey is its true full service offering. It has all the components required to comfortably accommodate and run an investment fund; variety of competition and proper service levels from custody banks, lawyers and fund administrators. It has the ability to fully service the funds industry, as well as having modern efficiencies where necessary to outsource to cost efficient jurisdictions for back office.

The same cannot be said of all jurisdictions, which have specialisations in particular areas, but Jersey not only has a broad offering, but a very real presence of fund managers themselves.

Fund structures
Principal structures on the island involve unit trusts, limited partnerships and corporate vehicles. Corporate vehicles can be single corporate or cellular structures, incorporated cell companies or protected cell companies. In addition, other options available are limited partnerships that are incorporated limited partnerships or separate limited partnerships that are not incorporated but have their own legal personality, foundations and common contractual funds.

As the market has developed, it is now the norm that for real estate investment, typically, it would be a unit trust or corporate structure; for private equity, it would be a limited partnership, possibly a corporate structure if it’s going to be listed; and for hedge funds, a corporate structure or a cellular structure, sometimes a limited partnership.
Jersey can service and provide all of the above structures, so that everything that is the accepted norm in the global funds industry is available in Jersey.

Regulation
A major feature of this jurisdiction is the flexibility and access to the regulator. Jersey boasts a very strong regulatory reputation combined with a choice of regulated and unregulated offerings, so it is possible to opt for an unregulated fund structure if that is what most suits you and your investor base. Alternatively, there’s a selection of different levels of regulated fund offerings, which very much depends on the particular need of the investor base and the manager.

Going forward, the most significant factor of change will be the Alternative Investment Fund Managers (AIFM) Directive coming out of Europe. Although Jersey will be classed as a third country for the purposes of the directive, because of Jersey’s proximity to Europe, at the moment, a large proportion of its fund industry is European focused, so responses must be made to the directive.

It is the intention of Jersey to maintain a strong fund offering, including one that addresses, adopts and adapts to the AIFM Directive. Appleby expects Jersey to be able to provide an alternative for those managers who don’t need to adopt or comply with the AIFM Directive, because their focus and investment base is different. For example, as well as offering products that comply with the directive, for managers who are not looking to raise money from Europe or invest into Europe, and don’t have to have exposure, Jersey offers products that don’t need to comply with the directive.

Global appeal
Because of the increasing sophistication of Appleby’s clients, now looking for multi-jurisdictional solutions and/or a comparative approach to the jurisdiction that identifies what suits them most, we’re finding that our global spread is more in demand than ever. We are fully able to address either of those requirements, whether, for example, an investor requires a Jersey fund manager with a Cayman fund, or, a Jersey fund with a Mauritian investment structure to go into Africa. Appleby has the ability to advise on and assist with all of those elements, and, as well as having the legal advisor capability, we’ve got the corporate and fiduciary services covered.

“Jersey boasts a very strong regulatory reputation combined with a choice of regulated and unregulated offerings”

It’s quite common for European private equity structures to involve an English limited partnership, which is then managed and controlled by the use of a general partner that is resident in Jersey. Similarly, a Real Estate Investment Trust (REIT) aimed at the UK real estate investments can use a Jersey company that would be tax resident in the UK. In both of these cases there are a variety of different methods of assistance and help. With the limited partnership there is the benefit and comfort of being an English limited partnership, although it can be argued that actually the Jersey law of limited partnerships is much more current and much more straightforward than some of the complexities of an English statute that’s more than 100 years old.

An important development that has occurred in the last two months is the introduction of the private placement fund classification, which is a fast track appropriately regulated regime aimed at structures that would come in sub-AIFM Directive and would continue to use the private placement regimes even when the AIFM Directive comes into effect. This identifies a particular demand from clients for speed, certainty and a clear and appropriate approach from the regulator. Beyond that, we expect to see developments in Jersey’s laws in relation to regulation of custodians, which will be classed as depositories under the directive, to allow clear application of the directive within Jersey law. Jersey will, of course, be accommodating the directive and adapt as it develops.

Looking ahead, Weaver predicts that more fund managers will be based on the island, and the sustained real estate and private equity fund industry will continue to maintain its stronghold. That said, it is likely there will be a broader geographical spread and focus for both real estate and private equity. In particular, markets like the Middle East and North Africa are definitely areas where there’s an appetite for Jersey opportunities, vehicles and domiciled funds, especially private equity related.

Weaver also highlights change for the private equity industry, with decreasing large buyouts, and more credit and mezzanine funds to replace the more limited bank lending, and more complex and interesting structures, which utilise the private equity and real estate asset classes. Finally, there will be more hedge funds seen coming out of Jersey because of different demands from different sectors in the world.
Castlegate Investment Services Limited is a full service fund administrator and provider of independent directorship services, operating from the British Virgin Islands.

Through a team of highly qualified and experienced individuals utilising leading fund administration systems, our aim is to provide a high quality, customer driven service, with an emphasis on responsiveness, attention to detail, competitive pricing and sound corporate governance.
All eyes on Bermuda

Peter Hughes of Apex discusses the benefits of Bermuda and the need for local service providers to maintain the jurisdiction’s competitiveness.

Bermuda’s credibility and international recognition is a result of its long established reputation founded on the quality rather than quantity of the financial transactions that originate there.

Bermuda has long been regarded as an exceptionally well-regulated jurisdiction largely as a consequence of the oversight of the Bermuda Monetary Authority (BMA), which screens those individuals who wish to do business from or within the island.

As a leading offshore centre, Bermuda has all the essential components necessary for a robust international business community. Some of the many advantages of doing business in Bermuda include its progressive regulation regime, lower tax jurisdiction, its location, the wide availability of experienced service providers and the quality of life that is enjoyed on the island.

Progressive regulation

The BMA has sole responsibility for the regulation, supervision and inspection of financial institutions operating in or from within the jurisdiction. The BMA has developed a risk-based approach when supervising these financial institutions, which allows them to concentrate their resources on those firms posing the greatest risk.

The BMA uses a common, core set of supervisory tools across all sectors of the business community for purposes of risk assessment. These tools include identifying risk impact groups and prioritisation, fundamental monitoring, prudential visits, risk assessment models and enhanced monitoring via on-site programmes. This risk-based approach has been endorsed by the International Monetary Fund as well as a number of varied international regulatory and standard setting bodies.

Lower tax jurisdiction

As a tax-neutral jurisdiction, Bermuda does not tax profits, income, dividends or capital gains. Profits can be accumulated, and there is no obligation or requirement to pay dividends. Profits can be accumulated, and there is no obligation or requirement to pay dividends. In fact, Bermuda’s only corporate-related tax is in the form of payroll tax, which is paid on all employees within a company at a maximum rate of 16%.

This is lower than, or equivalent to, most other competing jurisdictions. By comparison, Switzerland’s corporate tax rate currently ranges from 11.8% to 24.2%, depending on location within Switzerland, while Cayman, which also does not tax profits, income, dividends or capital gains, does however levy annual work permit fees of approximately two to three times that of Bermuda’s payroll tax.

Finally, the United Kingdom charges 28% capital gains tax and 40%-50% income tax.

Location

Bermuda is conveniently located in the Mid-Atlantic between the US and Europe, approximately 600 miles directly east of North Carolina. Bermuda enjoys easy access to many Eastern North American cities such as New York, Boston, Atlanta, Toronto, Washington D.C., Philadelphia, and Miami as well as numerous direct flights to London.

Accessibility to these gateway cities makes Bermuda an ideal place for an international company to be domiciled as it is critical to be able to have those all-important face-to-face board meetings, which allows companies to derive maximum benefit from Bermuda’s tax regime as well as minimizing adverse tax liabilities in the US and the UK.

In addition, Bermuda’s time zone is four hours behind GMT and one hour ahead of US East Coast Time making it a convenient location from which to conduct business with those customers, colleagues, partners, and suppliers that are based abroad.

Experienced service providers

One of Bermuda’s strongest points is the wealth of expertise that is available from a wide range of experienced service providers that are either home-grown, or have been at-
tracted to its shores from overseas. These high-caliber service providers, which include, but are not limited to, legal, fund administration, banking, auditors, insurance, and telecommunication/technology/e-commerce offer international companies the depth and breadth of highly-skilled professionals needed to carry out complex business transactions on a global scale.

In addition, Bermuda has a legal system founded on English Law, a well-educated, literate population – two-thirds of whom are of working age – and it enjoys one of the world’s highest per capita incomes. As a consequence, Bermuda is able to not only attract but also retain talented professionals of the highest quality.

**Apex’s long-term commitment to Bermuda**

Bermuda was Apex’s first office nearly eight years ago and since then the Bermuda office has been the spring board for the company’s expansion into 20 other jurisdictions around the world.

This growth is very much at the heart of Apex’s philosophy of providing personalised fund administration services by being based in the same location as our clients. This enables us to build working relationships with our clients so we can properly understand their businesses, their local regulatory frameworks and help them grow their businesses.

With the regulatory system continuing to tighten the Apex global network, which originated in Bermuda, the domicile is increasingly demonstrating its strength. Fund managers can benefit from an increasing level of risk management services as well as services that provide greater efficiencies. Two examples of these products recently launched by Apex include Apex Funds 247 and AFOS.

For Bermuda to remain competitive, other service providers located in Bermuda also need to increase the range of services they provide and critically continue to invest in new technologies.

Bermuda’s reputation as the leading offshore business jurisdiction is a result of having the aptitude to provide business solutions in many areas of international business including; fund administration, insurance and reinsurance, banking and e-commerce.

Having a sound regulatory approach and a mature business infrastructure, Bermuda has been able to distinguish itself from other competing jurisdictions as well as secure its premiere position in the eyes of the international business community. All of this allows for a streamlined process when establishing or incorporating a business on the Island.

“Bermuda has been able to distinguish itself from other competing jurisdictions”
High expectations

Fawaz Elmalki of Conyers Dill & Pearman talks to Mena FM about why Bermuda is globally acknowledged by fund managers as a centre of excellence for the alternative fund industry.

Given a choice, hedge fund and alternative investment managers have an incentive to seek out the most efficient and secure jurisdictions. They will choose to use only those jurisdictions that are efficient, secure and well respected. As hedge fund and alternative investment managers and investors are focusing on the most reputable and efficient jurisdictions, Fawaz Elmalki gives his view on why Bermuda ranks so highly.

Mena FM (MFM): What are the main advantages of offshore versus onshore domiciles?

Fawaz Elmalki (FE): To achieve competitive efficiency, an offshore jurisdiction must be dynamic and well regulated. Operational needs and legal structures alike must be accounted for. Solid and reputable offshore jurisdictions will enjoy good relationships with international regulators like IOSCO and the OECD and will have agreements in place with a number of other countries for tax information exchange. Sophisticated and efficient service providers located within an offshore jurisdiction, together with trusted judicial processes, will attract managers and assure investors that the offshore jurisdiction is a true financial hub and not simply an insecure stopover point. Bermuda ticks the boxes on all these criteria for an efficient, secure and well respected jurisdiction.

MFM: What will be the drivers for growth in offshore domiciles in the year ahead?

FE: First, a global economic recovery. We are seeing fund formation instructions steadily returning to 2007 pre-global financial crisis levels. In particular, workflows and fund setups are increasing on an exponential basis from China, Brazil, Africa, Russia and India while work-flow in the Mena region (in particular the GCC countries) continues to grow steadily thanks to high oil prices, high liquidity and the resilience of economic activity in that region.

Second, managers and investors are concerned about the impact onshore regulation will have on the industry, the costs associated with compliance and the effect on risk-taking. More regulation is not necessarily better regulation. Many managers feel that there is some dangerous water to navigate especially with respect to Europe’s Alternative Investment Fund Managers (AIFM) Directive. Overregulation may drive more business offshore. Bermuda, as one of the best regulated and highly respected offshore jurisdictions, would benefit from this.

MFM: What are the benefits to fund managers of redomiciling in Bermuda?

FE: Bermuda is an internally self-governing British Territory and offers all the security and stability traditionally associated with the British flag. Bermuda enjoys an independent legal and judicial system based on English common law, with a right of final appeal to the Privy Council in the United Kingdom. Bermuda is globally acknowledged by fund managers as a centre of excellence for the alternative fund industry. Much of Bermuda’s success in attracting funds is the fact that Bermuda’s Investment Funds Act strikes the right balance between regulation and the needs of the funds industry. Service providers (including the investment manager, any investment advisor, the custodian, the fund administrator and the audit firm) and officers must be vetted and approved by the Bermuda Monetary Authority (BMA). A properly qualified independent administrator is required, as well as regular reporting to the BMA. It is a model that emphasises disclosure over arbitrary prescription, giving investors and managers a certain platform for their agreements. The Act does not impose restrictions on the investment policies or strategies a hedge fund may adopt, but instead requires active, ongoing and thorough disclosure to investors. Fund managers thus have considerable discretion and flexibility as to how the fund’s affairs may be conducted, while investors are free to make appropriate and informed decisions based on their own assessment of risk.

MFM: How do investors perceive Bermuda as jurisdiction?

FE: Investors are asking hedge fund managers and sponsors to look for more regulated hedge fund domiciles. However, they still wish for the man-
agers to domicile their funds in a legal and regulatory environment that supports wide ranging and unrestricted investment strategies, as well as a quick and non-bureaucratic formation process. Bermuda remains committed to attracting quality funds by offering political and economic stability, a legal system based on common law, an abundance of professional service providers and an efficient regulatory framework of the investment industry that provides transparency and disclosure. Moreover, Bermuda’s leadership in the international financial centres’ drive towards transparency and cooperation has been noted by international investors as discussed below. Bermuda has a reputation for keeping a balance with the ever more present pressures of meeting and complying with internationally established and recognised legal and regulatory standards that have arisen from the increased international focus on developing a global approach to combating terrorism, money laundering and tax evasion. The international investor community is aware of Bermuda’s proven financial track record and long history of stability. This is reflected in its GDP per capita, which at approximately $69,000 is one of the highest in the world. Bermuda’s economic strength is also recognised by Fitch Ratings, which recently reaffirmed Bermuda’s AA+ rating due to its strong and diversified institutions, sustained account surpluses and low public debt burden.

MFM: How has Bermuda, as a fund domicile, responded to changes in regulation?
FE: To start, Bermuda has always put the emphasis on quality rather than quantity. The BMA has been insisting that persons proposing to establish funds in Bermuda are persons of sound business integrity and good financial standing well before the beginning of the 2007 global financial crisis. The BMA is a full member of IOSCO. Along with IOSCO, the BMA works closely with the Ministry of Finance for the continuous evolution of regulations adopted to meet the ever-changing nature of today’s business world. To ensure the highest standards are upheld, the BMA liaises closely with other regulators, both domestically and internationally, to provide the most effective consolidated supervision, in relation to entities for which the BMA acts as the consolidated group wide supervisor.

Bermuda’s reputation and track record for upholding international standards in investment fund regulation, and its vigilance against money laundering are an example for all jurisdictions. Bermuda continues to provide a regulatory framework in which business can continue to grow and prosper while maintaining a secure environment. Bermuda is on the OECD’s “White List” and has signed numerous tax information exchange agreements with G-20 and/or OECD countries modelled on the OECD standard for bilateral tax information exchange and continues to actively negotiate additional agreements. The US state department has consistently placed Bermuda in the lowest risk category for being used to launder money or finance terrorism.

Bermuda is also taking compliance with the AIFM Directive very seriously. MFM: Where do you expect new investment to come from? What are the emerging trends?
FE: The use of Bermuda companies in the BRIC nations is widespread and still growing. Bermuda companies are used as holding companies and as vehicles for takeovers, joint ventures, listings, trusts, funds, Islamic finance structures such as sukuk and other special purposes. There is no doubt that the BRIC countries have an increasing number of fund managers and high net worth individuals with capital to invest. This growing wealth has increased the appetite for offshore funds and companies and Bermuda has benefited from this demand.

On the structuring side, Bermuda is also benefiting from the increasing demand for funds structured as segregated portfolio companies and Shariah compliant funds. Bermuda was one of the first jurisdictions in the world to establish segregated portfolio company legislation. The Bermuda government is actively engaged in promoting the development of Islamic finance in Bermuda and exploring ways to support its growth. These initiatives build on the existing relationship between Bermuda and the GCC countries. Investors from the GCC countries already invest heavily in Bermuda-based investment funds and have significant interests in the local hospitality industry. The BMA last year issued Guidance Notes that facilitate the establishment of Shariah compliant investment funds in Bermuda. The Guidance Notes aim to recognise certain unique features of Shariah compliant funds and provide guidance on a number of issues, which such funds may need to consider in compliance with the regulatory regime.

“Bermuda is also taking compliance with the AIFM Directive very seriously”
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Here has been a welcome realisation that the Isle of Man is really a niche player in terms of offshore fund jurisdictions and that its strengths lie in smaller and start-up type funds and more niche, bespoke structures. Simon Harding of Appleby, Isle of Man, talks to Mena FM about how fund managers can find value in the Isle of Man’s size and open economy.

Mena Fund Manager (MFM): What are the strengths of the Isle of Man and how do these translate into fund formation in the jurisdiction?
Simon Harding (SH): The Isle of Man has a range of products and fund structures not dissimilar to those offered by many offshore jurisdictions. Most of the USPs of the island revolve around a high service level and a willingness to consider smaller and more distinctive funds. The other area the Isle of Man has done reasonably well in is private office, small family type funds, and that’s really where most of the new enquiries we receive are centred.

At the moment, fund formation is slow in the Isle of Man, with new fund work appearing few and far between. This is reflective of where the island has traditionally got its new fund formation instructions from. There are a lot of property funds established in the Isle of Man and clearly not many people are establishing property funds at the moment.

Traditionally, a lot of Cayman domiciled fund of hedge funds were administered out of the Isle of Man and I think this was often largely driven by capacity constraints in places like Dublin, which are now experiencing over capacity, so they can be very competitive on fees. Therefore, these types of mandates are not coming to the of the Isle of Man administrators in the current climate and generally that sector has suffered from withdrawals of investor money and poor performance.

“At the moment, fund formation is slow in the Isle of Man, with new fund work appearing few and far between”

MFM: What structures are currently available in the Isle of Man and what part of the funds industry uses those structures?
SH: Most of the instructions we’re getting at the moment are for so-called exempt schemes, which are private structures that can’t make public offerings, and are restricted to fewer than 50 investors. Effectively they are outside the scope of regulation and that’s probably the biggest category of enquiry and instruction that we are currently experiencing. There are also specialist funds, which are registered-type funds suitable for alternative asset classes because there are no restrictions on investment strategy or leverage, and while you need a regulated fund administrator, an auditor, an independent director and specialist investor entry threshold – ongoing regulatory requirements are quite light; for example, there’s no requirement for a custodian.

In terms of legal structures, you can form any regulatory category of fund as a corporate vehicle including PCCs, Unit trusts, and limited partnerships, although corporate vehicles are probably the most prevalent.

MFM: What do you think will be the most significant change in the Isle of Man in the next 12 months and how will this affect the fund industry?
SH: There is going to be a lot of work to do with regards to the Alternative Investment Fund Managers (AIFM) Directive, which will pre-occupy people in terms of change. There will need to be some amending regulation passed, which will require consultation and engagement with the regulator. I think it’s going to be quite a significant job, although it will probably not actually change the way that many funds operate because a lot of them tend to be smaller and private-focused funds. For administrators locally, FATCA is going to be a big challenge for them over the coming months and years.

MFM: How does Appleby’s global presence add value to the services it offers fund managers in each jurisdiction?
SH: Appleby is quite distinctive in that we have real fund teams based

Room for growth

Simon Harding, partner at Appleby, explains the unique strengths of the fund industry in the Isle of Man and the challenges and opportunities likely to appear in the future
in all our key jurisdictions, with strong teams in Jersey, Cayman, BVI, Bermuda, Isle of Man, Mauritius and Guernsey. We concentrate on making sure that existing and potential clients, whichever office they come to initially, are given fair and balanced advice on the merits of different structures and different jurisdictions in order to ensure they get the product that suits them most.

Being present in many different time zones also works in our favour; for example, we can offer administration services in an Asian time zone for a Cayman domiciled vehicle. We can be flexible and add value to the client in that regard. We offer pricing structures that reflect the fact that we can provide both fund formation, legal work and administration services.

MFM: What developments are on the horizon for the Isle of Man with regards to regulation, or otherwise?

SH: The focus in coming years is going to be on refining our product range to ensure that they are attractive to start-up and spin-out managers across a range of different asset classes. At Appleby, we are also encouraging people to use the island’s room for growth and relatively open economy to consider putting more elements of the value chain in the Isle of Man, and actually start up a management presence here.

Where the Isle of Man is quite distinctive compared to some offshore jurisdictions is that there is actually some capacity for growth. It is a relatively large place and restrictions on residence criteria and work permits are much more straightforward in the Isle of Man than other offshore domiciles.

MFM: What will the Isle of Man’s fund industry look like in five years’ time?

SH: It will hopefully look similar to what it looks like now, but larger. We have suffered on the island from the withdrawal or closure of some of the big fund administration houses, for example HSBC and Fortis, as they’ve concentrated on aggregating their operations in larger-scale jurisdictions. This has changed the landscape of the Isle of Man but I foresee that smaller niche fund administrators will continue to thrive, servicing a more bespoke and start-up focused type of client base.
Walk the walk

While the BVI investment funds industry has still not recaptured the growth rates experienced pre 2008, Niall Brooks of Castlegate explains why it can look forward with renewed optimism and vigour.

With more than 2,600 funds domiciled in the territory, the BVI still maintains its position as one of the leading financial centres for the structuring of investment funds and investment managers, a position only surpassed by the Cayman Islands, despite increasing competition from European jurisdictions.

In 2011 the country’s reputation was further enhanced when it received support and praise from the Financial Stability Board for its continued work in ensuring adherence to global regulatory and supervisory standards on international cooperation and information exchange. In addition, the Organisation of Economic Cooperation and Development (OECD) also endorsed the BVI’s regulatory and legal framework and with more than 20 Tax Information Exchange Agreements currently in place, the country can demonstrate its adherence to international standards on tax transparency and sharing of information. Such initiatives and ongoing commitment may serve the BVI well in the near future when the AIFM Directive in Europe comes into force in July 2013. The territory’s ability to market and promote BVI investment funds throughout the EU will continue to be on a “Private Placement” basis, with the potential, if the EU consents, of moving to a pass-through regime from 2015. Both of these avenues and routes into Europe will benefit from cooperation agreements between the BVI Regulator/Government and the EU host countries.

With the so-called “near” shore centres such as Dublin, Luxembourg and Malta seeing the AIFM Directive as a potential opportunity to attract both existing and future business from the traditional offshore centres, the BVI will need to tackle the challenge head on and clearly demonstrate to investment managers the benefits of continuing to use BVI domiciled funds and managers. In this regard, the BVI has recently established a focus group, consisting of members of the private and public sector with the aim of ensuring that BVI funds can continue to be effectively marketed throughout the EU.

“The BVI now has robust legislation, while maintaining at times a ‘light touch’ approach”

There has also been much hype, mainly from the European Fund Centres, about redomiciling funds from offshore centres like the BVI. While the potential benefits of redomiciliation, such as retaining a funds track record, are clear, the lengthy process and regulatory hurdles that need to be overcome cannot be understated and as a result discussion on the topic is often exaggerated.

Legislation recently introduced in the BVI, namely the Securities and Investment Business Act 2010 (SIBA), The Mutual Funds Regulations 2010, The Public Funds Code 2010 and the Regulatory Code may well play an important role in deciding whether the BVI meets the conditions that EU member states impose on both the territory and a BVI fund manager. The BVI now has robust legislation, while maintaining at times a “light touch” approach. For example, while SIBA now dictates that a licensed fund manager must appoint a compliance officer and have audited financial statements, the manager can seek exemption if it is deemed neither desirable nor beneficial for the shareholders. Indeed, the investment fund’s industry eagerly awaits the much needed legislation on exempt managers. Historically, the need for a BVI manager to be licensed has occasionally resulted in the delay in fund launches, which resulted in many managers applying for a Cayman exempt manager licence for their BVI fund. With the introduction of exempt manager legislation, this trend should be reversed and will make it more straightforward, more timely and ultimately more economical to both launch and operate a BVI fund.

SIBA also coincided with the introduction of on-site inspections by the BVI Financial Services Commission (FSC). Licensees and on island functionaries such as fund administrators should now need to “walk the walk” and physically demonstrate adherence to best practice in areas such as corporate governance, compliance, AML, training and education and record keeping. This in turn will provide a degree of assurance and comfort to overseas fund promoters and investors, especially those who may not be overly familiar with the lesser known functionaries.

One of the strengths and selling points of BVI investment fund legislation is that there exists no restric-
tive covenants in terms of the type (and location) of the functionaries. For example, while a Cayman fund requires a local audit firm to sign the audit report, BVI funds can utilise audit firms, effectively from anywhere in the world, more often than not in the same location as the administrator, which lends itself to greater efficiency and ultimately cost savings for the fund. Likewise, a fund’s administrator, custodian, broker and directors do not need to be resident in the BVI, which allows the fund promoter and investment manager/advisor as much choice as possible when it comes to selecting their service providers. That said, the attributes and benefits of appointing an administrator physically located in the BVI, which allows the fund promoter and investment manager/advisor to as much choice as possible when it comes to selecting their service providers. 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That said, the attributes and benefits of appointing an administrator physically located in the BVI, which allows the fund promoter and investment manager/advisor to as much choice as possible when it comes to selecting their service providers.

One of the most recent innovative products is the growing interest in the so-called “rent-a-cell or portfolio”. The leading jurisdictions have had some form of Segregated Portfolio Company (SPC) or Cell legislation for a number of years, with the BVI being no exception. Currently, as of the end of Q3 of 2011, there were 135 SPC’s in the BVI. One or two managers and fund administrators in Cayman and Malta have recently begun to re-package their SPC’s and offer a portfolio to advisors. The investment advisor avoids the need (and expense) of having to obtain an investment manager licence and go through the often onerous task of establishing a stand-alone fund structure, as well as avoiding some of the ongoing operating costs. Castlegate Investment Services are in the process of structuring such an offering in conjunction with an existing BVI fund manager, which should stir interest and curiosity from advisors and fund promoters at the smaller end of the fund spectrum.

An area of particular interest, especially considering the size of the BVI investment fund industry, which as mentioned before is second only to Cayman in terms of the domicile of choice, is that of corporate governance and the role of the independent non-executive director. The Weavering judgement in Cayman in 2011 focussed attention throughout the fund world on the need for effective, knowledgeable and experienced independent directors, who take their fiduciary appointment seriously, while the more recent fallout of the FT article on Cayman’s “Jumbo-directors” has been the need for transparency and/or some form of regulation. While everyone is waiting to see the next step the Cayman Islands Monetary Authority will take in opening it’s records and being more transparent in terms of disclosure of the number of positions individuals hold, and with jurisdictions such as Ireland introducing a Voluntary Code and Malta in the process of introducing a weighting for fund directors, BVI has been quite silent on the issue and has remained out of the spotlight. Part of the reason may be that SIBA is very flexible and allows directors to be resident anywhere in the world, so long as they meet the “fit and proper” test, which has led to a wide diversity of directors. How long this can remain waits to be seen since, with corporate governance and risk management becoming increasingly vogue and of importance to investors, it is an area that practitioners and the regulator may need to address. Thankfully, the BVI has a number of experienced and knowledgeable individuals who are capable of providing independent directorship services.

In the coming months and years, BVI certainly has a number of challenges that it needs to tackle.
The British Virgin Islands (BVI) is the world’s second largest offshore fund domicile with close to 3,000 registered funds and growing. The global recession affected the industry, with most funds during that time looking at their balance sheet and redemption issues. In some cases, funds were taken to court by investors for a variety of reasons directly caused by the impact of the recession on some funds. That scenario is almost behind us and what we are now seeing is a resurgence in the set up of new funds. More managers have now also seen some of the benefits offered by BVI funds and have, or are ready to, make the move to a BVI fund. With the updating of BVI funds legislation in 2010 through the passage of the Securities and Investment Business Act, 2010 (SIBA), the BVI is well poised to continue on this path of growth.

Definition of a fund
Under SIBA, a mutual fund or fund (commonly known as an investment fund or hedge fund) is defined as a company incorporated, a partnership formed, a unit trust organised or other similar body formed or organised under the laws of the BVI or of any other country or jurisdiction which:
(a) collects and pools investor funds for the purpose of collective investment; and
(b) issues fund interests (defined as shares in the share capital of a company, an interest in a mutual fund partnership and a unit in a mutual fund unit trust) that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company, the partnership, the unit trust or other similar body, as the case may be, and includes:
   i. an umbrella fund whose shares are split into a number of different class funds or sub-funds, and
   ii. a fund with a single investor that is a mutual fund not registered or recognised under SIBA.

Pursuant to the above definition, SIBA only regulates: (i) open-ended funds (whose equity interests are redeemable at the option of the investor), and (ii) administrators and managers of such open-ended funds. SIBA does not regulate closed-end funds.

Categories of funds
Funds regulated by SIBA fall within three categories: private funds, professional funds and public funds.

• Professional fund – this is a mutual fund in which fund interests are only made available to professional investors and the initial investment by all of the investors is not less than $100,000 (or equivalent).
• Public fund – this is a mutual fund that is neither a private fund nor a professional fund. All private and professional funds must be recognised under SIBA, while all public funds must be registered under SIBA.

“More managers have now also seen some of the benefits offered by BVI funds and have, or are ready to, make the move to a BVI fund”

Recognition or registration of a fund
The FSC requires a fund wishing to be recognised or registered to submit an application which must include evidence of the fund’s status together with details of each of the fund’s functionaries (being the investment manager, auditor, administrator and custodian).

In considering an application for recognition or registration, the FSC will in summary require that the manager, auditor, administrator and custodian of a BVI mutual fund be incorporated in either the BVI, or a “recognised jurisdiction”. The list of recognised jurisdictions currently consists of some 40 countries including: Argentina, Australia, Bahamas, Bermuda, Brazil,
Canada, Cayman Islands, China, Curacao, Hong Kong, Japan, Jersey, Luxembourg, Singapore, Spain, the UK and the US.

However, the FSC also has the discretion to accept functionaries incorporated in other jurisdictions if the FSC is satisfied that the jurisdiction has a system of effective regulation of investment business including funds.

Types of investment fund vehicles
Investment funds in the BVI are usually set up using either: (a) a BVI business company, (b) a limited partnership, or (c) a unit trust. The BVI business company is the most popular of the three vehicles.

- **BVI business company** - this is a separate legal entity from the investing shareholders and would be structured as a limited liability company. BVI business companies are regulated by the BVI Business Companies Act, 2004 which allows a great deal of flexibility in terms of structuring funds including the creation of segregated portfolio funds.

- **BVI limited partnership** - this can be established pursuant to the Partnership Act, 1996. A limited partnership is formed in the BVI by a general partner and at least one limited partner executing Articles of Partnership and by submitting a Memorandum of Partnership to the FSC.

- **Unit trust** - this can be established pursuant to a deed of trust. A unit trust arrangement is not a separate legal entity. It is the trustee who has legal capacity and who holds the assets of the fund on the terms of the deed of trust for the investors in the unit trust scheme. Under BVI law, the holders of units in a unit trust scheme are the beneficial owners of the trust assets.

Advantages of BVI funds
Some of the advantages of BVI funds include:

- Legal system based on English legal system
- A dedicated commercial court
- No requirement for local directors, functionaries or auditors
- Low cost – attractive to start up and medium size funds
- Efficiency – a private /professional fund can be established within two to five days if a proper application is submitted to the FSC
- Professional funds can commence trading up to 21 days before being recognised by the FSC
- No restrictions on investment policies and strategies or on performance fees or other arrangements
- Tax neutrality
- Segregated portfolio company funds available
- Exemptions available from the requirement to have an investment manager, custodian or auditor

Going forward
The BVI is currently in a very good position as it relates to the continued development of the offshore funds industry. It has recent legislation compliant with international standards and just the right level of regulation to give both managers and investors comfort. Clients globally are becoming more aware of the benefits of BVI funds including the fact that BVI funds can use their own auditors as opposed to a requirement for local auditor sign off which is required in some offshore jurisdictions. The ability to commence business up to 21 days before recognition for a professional fund is also a key factor for some managers who want to take advantage of opportunities which may be very time sensitive. Despite the challenges, over the last few years, the BVI as a fund jurisdiction has weathered the storm and has actually found itself in a very good position to embrace the future.
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- Investment Funds
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- Formation and Structuring of Private Trust Companies
- Capital Markets
- Corporate and Project Finance and Security Arrangements
- Aircraft and Shipping Registration, Finance and Leasing
- Incorporation and Formation of Holding and Investment Entities
- Corporate Restructuring and Insolvency

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Conyers Dill & Pearman
The Malta connection

Professor Joe V Bannister, chairman of the MFSA, details Malta’s ascendancy to its position of a premier EU fund domicile and why it is long expected to maintain this stronghold.

The Mediterranean region has always been of strategic importance to the EU, both in economic and political terms. The political situation on the Southern Rim is currently dominated by the transformational processes triggered by the Arab spring and by the new social dynamics and emerging economic patterns that are moulding its future. The Northern Rim, made up of the EU’s southern member states, is affected by one of the most protracted economic crises in recent European history; a crisis in which the stronger, northern, European states have also become embroiled through the financially integrated and economically challenged eurozone.

From a Mediterranean standpoint this must be a time of unique opportunity, a one-time chance to usher in a new regional economic order that would benefit the peoples of the two continents for decades to come. The EU acknowledges that a radically changing political landscape in the Southern Mediterranean requires a change in its approach to the region. Its three-pronged strategy is based on support for democratic transformation and institution building; stronger partnership at the people level and sustainable, inclusive growth and economic development, especially support to SMEs and development of the poorer regions.

The EU firmly believes that access to finance for the private sector is key to economic progress. Liberalisation of trade in goods and services and the free movement of capital can best be achieved if enterprises can finance their investment and operations in a free and fair market based on a sound legal infrastructure.

Malta firmly believes that access to finance for the private sector is key to economic progress and prosperity in the region. The European Commission is also proposing that this potential should be further exploited in the coming years.

Over the years, Malta has been a staunch supporter of initiatives taken within the MEDA framework to liberalise the circulation and repatriation of capital for direct investments and to provide funding programmes that are conducive to economic freedom and development. In these times of transition it is becoming even clearer that an integrated financial infrastructure needs to develop to drive the process towards achieving a truly Euro-Mediterranean free trade area.

Over the next 10 years, Malta sees this moving in step with:

• the development of financial
practices that can support all forms of international trade;
• the nurturing of a regional financial infrastructure through the standardisation of supervisory and regulatory systems in banking, insurance and other financial sectors; and
• the institutionalisation of regional funding programmes to instigate the development of a regional financial identity.

As a Mediterranean country that relies on its growing financial sector for further economic growth, Malta is acutely conscious of the need for the development of a regional financial system that can raise, attract and channel international capital across a whole spectrum of trade and investment opportunities in the region. To this end, it has extended its full cooperation to all partner countries who wish to share its experience in implementing EU and international regulatory standards.

The potential for business to expand and contribute to the development of the region is practically without limits. International financial operators attracted to the region should find the Maltese business environment extremely well-suited as a bridgehead. To start with, Maltese business is already heavily invested in these countries, granted the proximity of this market and the deep-rooted personal and social ties that underpin traditional commerce.

Secondly, the potential for Maltese companies seeking further diversification and market growth coupled with the needs of foreign companies seeking localised knowledge to compensate for the uncertainties and volatility in these markets should go a long way towards developing fruitful and lasting ventures in the region.

A good number of Malta’s 25 banks and numerous financial firms already have experience of investment in these markets. Quite a few of them also have experience in handling and managing fund flows across the region and further afield in areas ranging from trade finance to project development and private wealth management.

But perhaps there is no better way of reaching into the dynamics of this market than through the investment management industry. Since joining the EU in 2004, Malta has become known as a highly functional, low cost, well regulated entry point into Europe, particularly by the hedge funds industry, to the extent that the MFSA has licensed more than 600 of these funds in just a handful of years. Legislative innovation combining EU regulatory standards with industry best practice - such as efficient redomiciliation procedures, segregated and incorporated cell vehicle legislation, and customised, private equity frameworks - has been key to this development.

Fund managers have seized the opportunity and many are redomiciling to the island that promises much more than just an EU domicile. The trend has become exponential, sustained by the testimony of some 20 fund administrators already established here.

The MFSA has moreover signed more than 35 bilateral and multilateral Memoranda of Understanding with overseas counterparts dealing with regulatory cooperation and exchange of information, building up ties that can pave the way for more cross-border regulated business. A recent example is the signing of a Memorandum of Understanding with the China Securities Regulation Commission (CSRC), which allows Qualified Domestic Institutional Investors (QDIIs) to invest in Maltese PIFs and UCITS funds on behalf of Chinese investors.

Due to its strategic position on Europe’s southern flank, Malta also has solid cooperation and other technical agreements with neighbouring countries already in place – a reflection of the excellent relations it has always enjoyed with peoples of the same language stock. These agreements dovetail into Malta’s wider tax treaty network linking it to more than 60 countries worldwide.

Given the right conditions, Malta’s rigorously regulated platforms should continue to serve the international community to move capital in and out of the region with maximum efficiency, thereby contributing to the development of fully-fledged financial markets in support of the regional economic drive.

One hopes that in retrospect the times we are living will be seen as pivotal, turning the wheels of fortune in the direction of a longed for stability and prosperity in our neighbouring region.
Legal solutions that fit

The BVI funds legislation provides a flexible, user-friendly and recognised framework for the establishment of collective investment vehicles.

Our funds team offers efficient, practical, cost effective advice to those wishing to establish or restructure BVI funds.

We can assist with the setting up and structuring of fund vehicles including segregated portfolio companies and routinely provide our clients with advice and assistance in the preparation of the appropriate subscription and offering documents. We are comfortable working with all levels of clients, from large institutional managers to individuals seeking to establish alternative investment funds.

We aim to provide the highest level of service to our clients whether they are incorporating a private fund or arranging for the listing of a public fund on an onshore exchange.

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A LEADING BVI LAW FIRM

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After obtaining approval from the Malta Financial Services Authority (MFSA), Castlegate established a physical presence in Malta in July 2011 with the aim of delivering a professional, quality-driven and customer-focused fund administration service. The founders and principals of Castlegate, having previously worked in the Cayman Islands, the British Virgin Islands (BVI) and Ireland, utilise their wealth of experience and knowledge, not only in the delivery of fund accounting and corporate services to fund structures established in Malta but also to those in the aforementioned jurisdictions.

Growth of Malta funds industry
Malta has rapidly emerged as a leading fund domicile in a relatively short space of time. This growth is mainly due to the strategic and competitive advantages of the jurisdiction combined with aggressive marketing and a dynamic local industry.

The jurisdiction is in the enviable position of being able to leverage off its historical Mediterranean commercial partners, not merely its closest neighbours but stretching into the Middle East and beyond. Malta has been aggressively promoting its finance industry at both a diplomatic and commercial level for a number of years, principally utilising its membership of the EU and the euro as a catapult to gain access to new markets. The fruits of this hard work are the 60 plus double taxation agreements and 30 plus memoranda of understanding now in place as well as the emergence of Malta as a seminal funds jurisdiction within Europe. Local funds’ net assets have grown more than 700% since 2004 and Malta is fast becoming a serious competitor to both Ireland and Luxembourg. Fundamental reasons behind this growth include a combination of policy, people and price.

Policy
The Maltese government has a pro-business attitude and is committed to long-term growth in the financial services sector, aspiring to increase financial services to 25% of GDP by 2015. The government has put in place various stimuli including a highly efficient fiscal regime and special tax treatments as a means of attracting highly qualified foreign executives in the financial services industry. The MFSA’s approach to regulation and supervision is best described as ‘principles based’ rather than rules based and the regulator believes that this is proportionate to the size and nature of the business, without undermining investor protection. The licensing process is simplified and transparent in Malta with all financial services falling under one regulator. This model allows promoters to benefit from streamlined procedures, reduced bureaucracy and lower regulatory fees. The MFSA practices an open-door policy that actively encourages regular face-to-face communication with all its licensees. Before any formal applications for a licence are made, the MFSA encourages promoters to meet and discuss the proposal being put forward. This informal first meeting allows guidance and clarification on the licence application to take place and is often thought to be time saving and economical in the long-run. Fund promoters find this hands-on treatment less bureaucratic than in larger jurisdictions.

People
One of Malta’s greatest assets is its well-educated, English speaking workforce, which harbours a work ethic similar to that of the UK and northern Europe. In excess of 90% of the Maltese population are fully bilingual in both Maltese and English with the majority of people also fluent in a third European language. English is now recognised as the business language of Europe and is promoted as the language of legislation, education and business in Malta. As a small island with limited resources it has been the policy of several successive governments to invest in education, which has resulted in more than 60% of students attending third-level education. This educational pillar married with an outward-looking mentality and a willingness to quickly adapt makes investment in Malta an attractive prospect.

Price
The set-up and running cost of both retail and professional funds are considerably cheaper than more established jurisdictions. Total set-up costs for a Maltese Ucits average €20,000 to €30,000 with a basic Professional
Investor Fund (PIF) structure averaging between €15,000 and €20,000. The regulator has consciously kept application and monitoring fees low in order to remain at the forefront in terms of value against rival jurisdictions. Consequently, application fees for a PIF are €1,500 and €2,000 for a Ucits fund, with annual supervisory fees being €1,500 (additional €1,000 per sub-fund) and €2,500 (additional €400 per sub-fund) per scheme respectively.

Fund vehicle options
Malta has a broad range of options for establishing fund vehicles such as investment companies (SICAVs and INVCOS), incorporated cell companies, contractual funds, limited liability partnerships and unit trusts. To date, the most popular structure has proved to be the open ended investment company with variable share capital (SICAV). The Investment Services Act and subsidiary legislation provides for the setting up of Ucits and non-Ucits retail funds as well as PIFs. Ucits and non-Ucits retail funds are more restricted in their investments and have more regulatory requirements. They generally require more refined expertise from outside service providers and Castlegate is one of the few administrators on the island that currently hold a mandate to administer a number of Maltese-domiciled Ucits funds.

PIFs are typically alternative investment funds targeted at sophisticated investors and high-net-worth individuals. There are three different types of PIFs structure available including the Qualifying, Extraordinary and Experienced investors funds, the essential difference being the eligibility of investors to invest in each structure. So far PIFs have formed the backbone of the funds industry with in excess of 400 PIFs now domiciled in Malta. The majority of these PIFs are also serviced in Malta which is testament to the high quality of local service providers. Qualifying and Extraordinary investor PIFs have no investment restrictions and no borrowing limits, thus are suitable for hedge funds.

Benefits to fund promoters
Besides historical relations and established commercial connections, Malta is an ideal stepping stone both to and from the emerging markets of the Middle East and Africa. There are two key reasons for this: stability and market access.

In recent times, Malta has been a beacon of political stability and financial consistency in a region that has seen much turmoil and change. Malta has been left almost completely unscathed by the financial instability that affected much of Europe and was recently ranked as having the 12th soundest banking system in the world and ranked 15th for financial market development by the World Economic Forum’s Global Competitiveness report (2011-12). This soundness and stability is vital as retail investors in particular have become more cautious about the safekeeping of their assets within regulated markets. Likewise, institutional investors are also seeking robust regulation and transparency for investors.

Moreover, as a member of the European Union, Malta offers promoters access to an internal market of in excess of 500 million people across the 27 EU economies. With the Alternative Investment Fund Managers (AIFM) Directive coming into play in 2013 many fund managers are seeking a European base for their operations so they can market their funds to European investors. As a result of the implementation of the AIFMD, investment funds domiciled in Malta should benefit from the pan-European passport offered to professional investor funds. Furthermore, an additional incentive permeates around the Ucits IV Directive, which is now fully implemented, whereby management companies set up in Malta can not only exercise passporting of a Maltese Ucits to all investors across Europe but can manage Ucits established in other European jurisdictions without the need for a physical presence.

Finally, it is worth noting that the MFSA has been particularly proactive in seeking to accommodate Shariah-compliant funds. In fact, Malta is one of the only jurisdictions in which the regulator has specifically formulated a set of guidelines for Shariah fund structures. These guidance notes detail how the various fund requirements can be moulded into available fund vehicles. Generally, Shariah-compliant funds can be set up as either retail or PIFs, however MFSA guidelines recommend that Ijarah and Murabaha funds, which commonly invest in unconventional assets, are usually best structured as a PIF.

In conclusion, the combination of dynamic policy, highly trained people and competitive pricing have propelled Malta onto the global stage.”

“Dynamic policy, highly trained people and competitive pricing have propelled Malta onto the global stage”
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