



Offshore Fiduciary Arrangements: A Primer

By Charles Cain

Reviewed by James Kingston

With many years of experience as a leading trust practitioner on the Isle of Man, Charles Cain has gained major insights on the history and development of the industry. In this book he seeks to reach a non-professional readership, in order to aid greater public understanding of an industry prone to attracting misconceptions and in recent years a degree of controversy. In fact, the book does just that and is a short and useful publication for those wishing to learn the basics of the offshore system.

As such, he takes the reader through the key concepts of the international fiduciary industry; the common law and civil law; equity, trusts and fiduciary arrangements; civil law vehicles such as the foundation; tax and the varying forms of tax; company law; and the diversity of legal vehicles by which individuals have sought to do business, lower tax, and protect assets. In all areas he notes points of contrast in legal approaches taken by certain jurisdictions. Central to this are the differences highlighted between the common law of England and her former Empire, and the civil law prevalent in jurisdictions with a Continental heritage; so too is highlighted the mismatch between the rhetoric of certain political establishments and the policies their states underwrite.

Cain goes into great detail round the concept of the trust, an idea often comprehended with difficulty both by the layman and those of a civil-law background. He introduces ideas such as the settlor, trustee and beneficiary; highlights the nature of all-important split created between legal and equitable ownership of an asset among trustee and beneficiary; and introduces such fundamental precepts of trust law as the 'three certainties' of intention, subject matter, and object.

Keen to emphasise the nature of the trust as a relationship outside of the common law as such, but open to the principles of equitable remedy developed over hundreds of years, the author goes on in later chapters to offer a small note of caution to those who may be tempted to make use of jurisdictions such as Jersey, where trust law was introduced by statute, on the ground that they "will always lack that flexibility and capacity for innovation that is the hallmark of equity." Indeed, he considers the common law equity system "arguably the greatest contribution made by the English legal profession to the world."

Moving from his elaboration of trust law, the author goes on to consider company law, introducing the reader to ideas of corporate personality, limited liability, corporate governance, and shares and stocks. As befits a book so concerned with fiduciary relationship, Cain highlights the essentially fiduciary relationship of company directors to company members, a point he returns to in his chapter on control of companies, trusts, and assets.

Charitable structures are also considered in this work. Aside from the obvious utility of charities in providing social goods, he draws attention to the three uses of charities in fiduciary tax planning; as vehicles holding assets with tax breaks available on transferring assets in; as a vehicle for holding assets in such a way that a donor may continue to manage the charity for his lifetime; and as vehicles with minimal assets, but with the charity nevertheless controlling substantial assets.

As suggested above, the issue of control is of great importance to many potential settlors, some of whom have met with difficulties around this point. A central tenet of trust law is the transfer of legal ownership and control away from the settlor to the trustee, and whilst many

attempts have been made to find ways that a settlor may retain ultimate control the pursuit of such measures, perhaps through a limited Partnership Interest, may open the trust to the risk of being considered a sham in the eyes of the law. Even if a jurisdiction seeks simply to change the law, allowing a settlor to control the trust, it is held that other jurisdictions would simply fail to recognise it. Potential users of trusts are therefore warned to pay great attention to their arrangements.

As befits a book aimed at non-practitioners and interested members of the public, Cain takes time to address many of the complaints aimed at the industry in recent years. He firmly roots the offshore industry in traditions of English liberty, questioning the priorities, efficiency, and outcomes of political systems which aim to centralise too much power in the hands of bureaucracies. Harsh judgement is reserved for socialist patterns of high spending and taxation as ruining efficiency. With competition identified as key to economic development and growth, criticism is therefore aimed at efforts towards international "tax harmonisation". Aside from broader points of political economy, Cain also repeatedly underlines the central role of offshore structures in providing asset protection in unstable jurisdictions and in the face of authoritarian regimes, and defence against the forced heirship rules to be found in civil law countries.

The author offers strong criticism against bureaucratic criticism emanating from those countries which whilst they may pressure offshore centres, spend little time examining their own low tax regimes – namely the UK's City of London and the US's state of Delaware. Particular ire is reserved for the latter, the "most secretive and opaque jurisdiction in the world". As might be expected, he rejects contemporary efforts to turn taxation into a moral issue; taxes imposed by the government on a citizen are no more moral than traffic regulations. Whilst some particular taxes may be perceived as immoral (the author uses the example of the Poll Tax), the system as a whole is not, and it is possible to apply concepts of morality to the system 'only insofar as there is a breach of a duty owed by governments to apply the taxation system in a manner which is not confiscatory or discriminatory, but which leads to the greater economic and social benefit of all citizens'. Overall, it is a book worth reading for those on all side of the debate.

Understanding 'Offshore' - Offshore
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