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## Shore to shore

SHANA TING LIPTON 19 JULY, 2016

***Shana Ting Lipton assesses the relationship between United States law firms and their counterparts in offshore jurisdictions.***

United States law firms are no strangers to the world's leading offshore jurisdictions; the visibility of countries such as the British Virgin Islands, Bermuda, Cyprus and the Cayman Islands among US law firms was well-established by the early 2000s, as such firms benefited from an offshore workload which increased with each passing year.

Arguably, it was the tide-shifting events of the 2007/2008 financial crisis, notably the fall of Bear Stearns and the unravelling of the Bernie Madoff Ponzi scheme, which created fertile soil for disputes work in the last decade, in particular for US firms' New York offices. This has led offshore and onshore firms to team up on everything from insolvencies to shareholder disputes.

### THE RISE OF INSOLVENCY COLLABORATIONS

“Since the financial crisis, parallel bankruptcy proceedings have been prominent because so many funds and offshore investment vehicles have gone bust – whether because of fraud or financial difficulties,” says **Stephen Pearson**, a partner at **Jones Day**, who divides his time between both New York and London.

Accordingly, he is currently acting for a trustee in the *Soundview* case, which involves chapter 11 US bankruptcy proceedings over six Cayman Islands investment funds – half of which are concurrently in parallel Cayman Islands bankruptcy proceedings. Pearson says that such circumstances precipitate a real need for collaboration between firms, practitioners and office holders, “because you have to work together to do various things in an efficient, synergistic way in the best interest of the stakeholders in the estates”.

The process, he explains, has involved his firm and Cayman Islands firm **Campbells** essentially co-advising the estates. The court in each jurisdiction was presented with a protocol, which designated tasks among jurisdictions and office holders, and included efficiency-facilitating variations on standard US law and procedure and standard Cayman Islands law and procedure.

**Christian Luthi**, director in the litigation and restructuring department at **Conyers Dill & Pearman** in Bermuda, confirms that his firm regularly gets a fair share of commercial litigation, company and insolvency-related collaborative work with onshore counsel, particularly where there is an entity incorporated offshore which is distressed.

Luthi and his colleagues are sometimes called upon to appoint provisional liquidators, with a view to restructuring a financially distressed company. He has partnered on this and other matters with US firms such as **Skadden, Akin Gump, Reed Smith, Hogan Lovells, Davis Polk & Wardwell, Jones Day** and **Brownstein Hyatt Farber Schreck**, among numerous others as well as the US arms of UK firms like **Clifford Chance**.

## INJUNCTIVE RELIEF REVISITED, OFFSHORE AND ONSHORE

Interim relief or injunctions are also well-suited for such disputes work cooperations – where offshore counsel is needed to secure such relief or to seek local discovery. Equally, across the ocean, “US firms have been quite good in pioneering techniques for freezing assets in New York”, notes **Phillip Kite**, global head of litigation and insolvency at **Harneys** in the BVI, adding that this trend has arisen as a consequence of offshore transactions largely clearing through the New York banking system in US dollars.

One of the trailblazers in this arena, he says, is **Warren Gluck**, a New York litigation attorney and member of **Holland & Knight’s** litigation and dispute resolution practice. Gluck deals with asset tracing and has worked closely with BVI and Cayman Islands firms – among them **Harneys, Carey Olsen, Walkers** and **Maples and Calder**, on litigation and bankruptcy applications and the like.

“My personal practice has increasingly involved offshore commercial disputes over the last couple of years,” says Gluck, underscoring the continuing reverberations from the 2008 financial crisis, and the Madoff-style frauds cases, including the *Fairfield Sentry* liquidation in the BVI. “Certainly 2008 produced circumstances – whether involved with capital-F fraud or just routine downward trends in the economy – where there have been a lot of commercial disputes involving offshore jurisdictions. There’s definitely been a good amount of activity.”

Accordingly, he has tapped into his varied expertise to work on offshore disputes matters. “In conjunction with wire tracing, which is very useful in offshore asset recovery cases in particular, and which enables one to determine worldwide assets in the first place, the concept of the global freeze is taking on increased importance,” he explains. Prior to 2010, although available in jurisdictions like the BVI, England and other common law, UK-influenced court systems, this mechanism – akin to a *Mareva* injunction – could only be obtained in rare and limited circumstances in the US.

## WHAT THE US COURTS SAY

Now, however, US courts are tackling questions related to the meaning and nature of property in the 21st century. Gluck cites the 2010 *Hotel 71* case in the New York Court of Appeal, which has authorised ‘global’ attachments of defendants’ property when the defendant is subject to jurisdiction, and represents a departure from the prior US legal view.

The court held that personal jurisdiction over a defendant can attach to their intangible or tangible property – wherever it is located – effectively broadening the scope for such orders. This decision has paved a path for a developing area of law (which Florida’s courts are now also looking at), and has already impacted split offshore and onshore disputes.

Another component of onshore/offshore firm disputes collaborations is in the area of conflict of laws between competing jurisdictions. Anti-suit injunctions are often sought “when one party commences proceedings in the US and the other in an offshore jurisdiction to prevent the parties who’ve agreed to submit to jurisdiction or arbitration in Bermuda, from commencing proceedings in the US or elsewhere”, explains Luthi.

## THE LIMITS OF COLLABORATION

However, not all offshore jurisdictions are known for the same sorts of inter-firm collaborations. Cyprus law firms tend to work with US firms’ London offices on Eastern European shareholder disputes – commonly Russian work. Bermuda largely sees trusts litigation, as well as insurance and re-insurance disputes – “a lot of the **Lloyds’** market and the American market re-insures out of Bermuda”, notes Kite. The Cayman Islands – rich in hedge funds and investment vehicles – tends to

draw a fair share of funds litigation. The BVI also boasts a continuing flow of funds litigation work, much of it streaming in – and continuing to stream in – after the 2007-2008 financial meltdown.

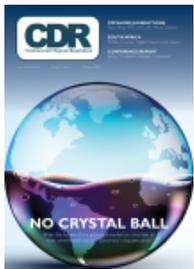
Saliently, both Cayman and the BVI – as homes to many offshore structures for operating groups in China and Russia – appear to be on the precipice of a promising area for further offshore/onshore dispute cooperations in the near future, stemming from the emerging markets crisis, according to Pearson and his London colleague, partner **Barnaby Stueck**.

This work will stem, by way of example, from US stakeholders' investments in New York-denominated bonds, which are issued by Cayman or BVI vehicles, in respect of an asset structure where the underlying operating companies are in such emerging markets. When groups in those markets – chief among them the Chinese and Russian markets – experience financial difficulties prompted by current market instability, the concern is that the companies may pay off local (usually Chinese or Russian-based) creditors and leave other investors high and dry.

Stueck hence emphasises the importance of a strategy that involves taking some control over the relevant group at the highest level and then seeking some form of parallel appointments over the local [Chinese or Russian] entities, he says.

“That’s when it’s important for clients to be going to offshore law firms who have a good collaborative relationship with US law firms and vice-versa, and can therefore implement a global solution.”

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