

ROUNDTABLE

Who's Who Legal brings together four of the leading practitioners in the world to discuss key issues facing lawyers today.



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WWL: Much of the work cited by practitioners in the past year seems to have been driven by regulatory changes and the need to comply with these. Would you agree with this? How has the type and volume of work you have seen in recent years altered?

Andreas Richter: I agree with this statement. In Europe a main driver of regulation is the Alternative Investment Fund Manager Directive. Wealthy individuals are affected in two ways: as investors in alternative investments, and also in club deals – some of which are now regulated.

James Tsang: Yes, I agree with this observation. In recent years, especially after the passage of FATCA in the US, the volume of regulatory and compliance advice has surged. This type of work has taken different forms. First, requests for compliance advice by HNW clients as well as institutional trustees abound. I think two key reasons are that the compliance rules have become more complicated and that the cost for any mistake has increased. Second, there was more trust restructuring work to cater for the new regulatory environment. Finally, more clients felt inclined to consider or enter into the compliance programme with the tax authorities such as US's OVDP and streamlined filing compliance procedures recently published by the IRS.

Patricia Garcia Mediero: Certainly so. Spanish practices with institutional clients have been heavily involved in advisory work concerning the implementation of FATCA and its additional regulations now fully in effect as of 1 July 2014.

As for Spanish practitioners advising both domestic and international private clients, there has been a noticeable shift in approach, in order to provide the right balance between managing tax risks (by means of careful compliance in an increasingly complex world of regulatory reporting requirements) and personal tax efficiency.

Tony Pursall: Regulatory changes have created some additional work, although it has not yet been substantial offshore. However, we expect that to grow. The most obvious example is where we are asked to advise on the impact of US and UK FATCA as implemented in the Cayman Islands and the British Virgin

Islands. The move towards automatic exchange of information through FATCA and, more recently, the Common Reporting Standards, has led to banks, trustees and other clients seeking more advice on tax and regulatory implications in key jurisdictions. This has principally been in the larger high-tax jurisdictions, but we have more recently seen some clients start to take advice on those issues in the Cayman Islands and BVI as well.

There has been a consolidation in the trust industry over recent years, with some smaller providers pulling out of the market and some of the larger institutional trust companies consolidating their offering in fewer jurisdictions. This has led to an increase of legal work, in relation to the sales and purchases of those businesses and to the change of trusteeships where settlors do not want the trusteeship to go across to the purchaser.

The overall volume of work over the last few years has remained fairly steady. The type of work has not changed significantly, although there has been a continuing trend towards a smaller number of higher-value, more complex structures. We have also seen an increase in contentious trust work, particularly in the Cayman Islands.

WWL: With increasingly complex family structures and the transfer of wealth from those who established trusts in the 1970s and 1980s to the next generation, the amount of contentious work still appears strong. Have you noticed any change to the level of dispute work in your jurisdiction? What are the key issues in contention?

Andreas Richter: Germany is not a trust jurisdiction. On the whole the amount of contentious work for wealthy individuals is low, but there are some prominent cases where the next generation is no longer accepting the agreements that their parents entered into. In a number of family businesses members of the next generation are uncertain as to whether they want to hold on to their investment. Often this has to do with tension between major shareholding stems and minority shareholders. Minority shareholders feel that they have too little say and more importantly too small distributions.

James Tsang: We have also seen this development in Hong Kong and Asia. The key issues being addressed often include: the rights of the beneficiaries of a trust, such as entitlement to the trust assets or the information about the trust; to what extent the spouse of a beneficiary could claim the assets of the trust in the event of a divorce; and what are the beneficial interests that a group of beneficiaries (frequently siblings and their family members) are entitled to in a discretionary trust. In a case that our firm handled last year, there were multiple lawsuits in different jurisdictions with links to the trust – the location of the assets, the place of administration of the trust, and the place of incorporation where a corporate protector was organised – being filed and litigated at the same time.

Patricia Garcia Mediero: Spain is a jurisdiction with a relatively low level of contentious work at court level as regards trusts and estates. Most disputes tend to be resolved through private agreements. Usual disputes include family members with minority stakes in privately owned family companies who wish to cash out of their investment, or disagreements in management approach and business strategies in second-generation family companies.

Tony Pursall: Yes, we have seen an increase in the level of contentious trust and estate work in both jurisdictions. The issues in dispute on the matters we are currently advising or advised over the last year or two include: allegations of breach of trust for mismanagement of trust assets; advising a trustee on issues arising from allegations of insider dealing affecting trust assets; allegations of breach of trust against trustees for overcharging fees and putting themselves in a position of conflict of interest; applications for rectification; disputes between different members of an enforcer committee of a philanthropic purpose trust under the Cayman STAR legislation; a dispute over the beneficial interest in the shares in a BVI company of a deceased individual; applications to remove trustees; applications to appoint a receiver over a power of revocation; challenges to the validity of trusts and wills (fraud, incapacity, undue influence); tracing the proceeds of fraud or breach of trust into trusts; variation of trusts; applications for directions in respect of ‘momentous decisions’; and Beddoe applications.

WWL: We have heard reports of new jurisdictions being particularly active sources of work, notably regarding high net-worth (HNW) individuals and families from Eastern Europe, Asia and Africa. Is this something you are seeing and what challenges are being thrown up by these new clients? Have your practice or your firm had to adapt?

Andreas Richter: There are changes. However, Germany is not an inbound country and does not offer tax holidays for wealth immigrants. We see people from Eastern Europe coming to Germany. Pre-immigration planning focuses on dismantling structures in low-tax jurisdictions. If this is not carried out, then income will be attributed irrespective of distributions. Tax on dry income is not attractive.

James Tsang: Yes, this is not only a recent development, but also a trend. We have seen a surge in clients from China and other parts of Asia looking for advice on complex trust and succession structures – prompted by the wealth generation and the need for sophisticated planning in these countries, I suppose. The challenges include the skills and experience required to decipher the foreignness of common law trust concepts to such clients, and the need to adapt the planning to their local law requirements (eg, civil law-based legal system, marital property regime and restriction on foreign ownership in assets located in their countries). To keep up with demand, we have to keep abreast of the legal and regulatory requirements in these countries, integrate our private client team with our colleagues located in these jurisdictions, and maintain good networks with local counsels who have expertise in this field.

Patricia Garcia Mediero: A significant part of Spanish international private client practices involve advice, implementation and conveyance work on purchases or disposal of Spanish real estate by foreign individuals. We have observed a noticeable increase of transactions of high-end residential properties (more than €5 million) involving acquirers from Eastern Europe and Asia (particularly China), typically from UK/continental Europe sellers. Tax compliance and home country regulations/obstacles (the latter particularly for countries with FOREX restrictions, formally or in practice) are complications that tend to arise in practice.

Tony Pursall: We continue to see an increase of work from certain new jurisdictions, particularly the Middle East, Asia and – to a lesser extent – Africa. The key concerns of clients all over the world are very similar, in that they wish to preserve their assets for the benefit of their families in the most appropriate way. However, the threats to those assets vary – in many jurisdictions in the Middle East, as well as Russia/CIS, the biggest concern is often that of political risk or to ensure that their sons and daughters are treated equally. In Latin America, the risk of kidnapping is often a major concern. In some jurisdictions, there is a higher risk of corruption, necessitating a greater level of customer due diligence to verify the source of funds.

In China and other parts of Asia where the wealthy clients are of Chinese origin (much of South East Asia), clients wish to be able to deal with people and documents in Chinese, and prefer face-to-face meetings. As a result, we have two dedicated trust lawyers and a number of Mandarin and Cantonese speakers in our Hong Kong office, and we have translated a number of key documents into Chinese, which comes with its own challenges.

WWL: With HNW individuals and families more mobile than ever, and family members and assets often based in multiple jurisdictions, private wealth management has become more complex. How have your practice and your firm adjusted to meet this trend? Has this development had any impact on the legal market, such as benefiting firms with a larger global footprint?

Andreas Richter: We have benefited, and continue to benefit greatly. Our firm has always focused on cross-border work in the fields of M&A, fund formation, tax, real estate and family offices. Given that we have best friends in all relevant jurisdictions our clients do not ask us about offices abroad.

James Tsang: The adjustment for us is constant. We are fortunate enough to have a large global footprint, a network of offices and, most importantly, an integrated private client practice across offices. It has become necessary that the private client practice will be multi-jurisdictional and multi-disciplinary, involving cross-border tax, trust, litigation, real estate and corporate practices. You have one client from China who would like to purchase real property in the US and the UK one day, and then you have another client from Hong Kong who would like to invest in an Israeli or German company through her trust structure the next – all under significant time pressure.

Patricia Garcia Mediero: There is a natural drive for global/large institutional clients to seek law firms with a larger global footprint, and in our opinion this is likely to remain the case.

However, we notice that national and international private clients are increasingly seeking smaller but highly specialised firms that are able to remain flexible, agile and confidential, while at the same time having the capabilities to work on cross-border projects with other specialised firms in other jurisdictions.

Although the ability to perform cross-border work is critical to clients, they seem to be somewhat reluctant to rely on big brands for personal advice, and tend to seek independent specialised firms for their cross-border needs. An additional recurring comment from clients is that big firms tend to offer very limited services relating to cross-border international private law matters on successions and marriage/family law. Clients see this as an integral part of their tax and legal needs and find that big firms tend to be too corporate-centric to fulfil their needs in this respect.

Tony Pursall: We have dedicated Cayman and BVI trust lawyers in each of the major time zones – ie, the Caribbean, London and Hong Kong – so that we can provide timely advice to our clients and intermediaries. As we are not providing the onshore legal and tax advice, the larger global footprint (ie, in terms of being in each of the onshore jurisdictions) is not relevant to us.

WWL: What key developments and challenges are you expecting in the private client sector in the next year?

Andreas Richter: Clients continue to look into real assets such as alternative investments, real estate and participations in enterprises with strong cash flows. Wealthy German families have put a lot of attention into being tax compliant. Therefore, the increased level of exchange of information does not have significant effects. However, there is a growing concern about privacy.

James Tsang: I predict that regulatory and compliance work will continue to drive the work, whether in relation to trust restructuring or new planning work resulting from the awareness of the importance of an effective and compliant structure for passing on wealth. Given the ever-changing regulatory landscape in many jurisdictions at the same time, one will see more, not less, complexity in structuring for wealth planning. Another area of growth would be prompted by the mobility of families – people immigrating to a new country and expatriating from another – and that would result in a number of interesting legal and tax issues for the individuals and the trust structures alike. Finally, enhanced foreign enforcement by global tax authorities will not only motivate families to structure or restructure their wealth planning properly, but also give rise to work such as OVDP, streamlined compliance, negotiation with the tax authorities and tax litigation.

Patricia Garcia Mediero: Globally, we expect a further increase in work relating to correct compliance and tax disclosure, with a drive towards simplifying clients' tax structures in order to minimise compliance risks.

Locally in Spain, we foresee that most work will centre around real estate transactions (with the high-end real estate market showing signs of consolidated recovery), the Spanish tax reform, which will bring out substantial income tax, wealth tax and corporation tax changes in 2015 for both national and international private clients and the full implementation of the EU Succession Regulation in 2015, which will be a radical change to the Spanish succession rules for civil law purposes.

Tony Pursall: The move to greater transparency is clearly going to continue. In particular, it seems likely that there will be a move to more automatic exchange of information. If the Common Reporting Standards become a global standard for automatic exchange of information, the effect may be that fiduciaries and advisors will effectively need to satisfy themselves that clients and the relevant structures are compliant with all tax and regulatory laws in all relevant jurisdictions and that they are monitored on an ongoing basis to ensure that they remain so. If that happens, it will not effectively be possible for an advisor in one jurisdiction to focus solely on that jurisdiction. As a result, the compliance costs will mean that the trend towards a smaller number of higher-value, more complex (and better advised) structures will accelerate.

We expect the consolidation in the trust industry to continue in the short term, given the increased costs of conducting trust business in an age of ever-greater regulation, as smaller payers continue to sell up and larger banks and trust companies consolidate their businesses.

There are also rumours relating to the possible introduction of estate duty in both India and China, which could be a strong driver for lifetime planning in Asia.