TRUST BERMUDA 2017-18

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CALM AMID THE STORM

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ithout doubt, no one will forget the past year – though many of us may want to.

In June 2016, the UK voted to withdraw from the EU. In November 2016, Donald Trump pulled off the biggest upset in US history to become the nation’s 45th president. Theresa May gambled and lost in the June 2017 UK snap general election – ironic, as she called it hoping to secure a stronger majority mandate to negotiate Brexit.

Meanwhile, centrist Emmanuel Macron won the French presidential election in May 2017, beating far-right candidate Marine Le Pen. It will be interesting to see whether Angela Merkel can withstand the right-wing Alternative for Germany party in the German federal elections in October 2017.

Clearly, we live in an era of regular, unanticipated political and other change. The geopolitical landscape has become unstable as international relationships have been redefine by leaders paving the way for an unpredictable ‘new normal’.

As STP members seek to ‘advice families across generations’, it is helpful to know that, in the midst of global instability, Bermuda remains stable, focused and familiar. The island has maintained its position as a clean, well-regulated and sophisticated jurisdiction, and continues to play a pivotal role in large-scale fiscal, succession and estate planning. It has introduced legislative reforms to modernise its suite of corporate and trust offerings, including:

- the Limited Liability Company Act 2016;
- the Perpetuities and Accumulation Amendment Act 2015;
- the Contracts (Right of Third Parties) Act 2016;
- the Partnerships and Companies Amendment Act 2016;
- the Bermuda International Interests in Mobile Equipment (Cape Town Convention) Act 2016, and
- the Personal Information Protection Act 2016.

These legislative enhancements, combined with Bermuda’s reputation, stability and solid infrastructure, will only further enhance the island’s attractiveness as an international financial centre. Bermuda consistently remains second to none among the world’s business jurisdictions.

I am certain that the world’s new normal will create new investment, business and relocation opportunities for Bermuda as families and businesses search for a safe harbour.

LEAH K SCOTT JR, MP is Legal Counsel and Corporate Secretary For the Harbour Group of Companies, and President of the Bermuda Association of Licensed Trustees.
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Risky business

Risk, like death and taxes, will always be with us. But there are few places where it is better rationalised and mitigated than in Bermuda, writes Elliot Wilson

In the film Grand Canyon, Kevin Kline’s character Mack runs into trouble late one night on an LA freeway. When salvation arrives in the form of a tow-truck operator, the rattled immigration lawyer observes that there are so many ways to ‘buy it’ in LA. Mortal danger, he realises, is little more than a heartbeat away.

That film was released in 1991, when car phones were still a novelty, mobile phones were the size of a brick, and ‘cybersecurity’ was a word found mostly in science-fiction. How our lives have changed. In the 1990s, the wealthy feared physical threats above all others. Kidnapping, extortion and old-fashioned white-collar fraud kept the patriarchs and matriarchs of high-net-worth (HNW) families awake at night.

Many equate kidnapping with areas of Latin America or Africa, but this threat to our families’ safety is as old as human society itself. Indeed, kidnapping is far from an alien concept even in the West. Italy suffered from a spate of kidnappings in the 1970s, and the problem has never really gone away.

Even now, notes Elman Myers, Managing Director, Miami, at Bermuda-based insurer Hiscox, organised criminal groups ‘present a threat to HNWs and their families’. The threat is still ‘especially high’ in Latin America, where gangs ‘engage in a wide array of criminal activities’, from armed violence to the trafficking of pretty much any asset, from narcotics to currency to people.

This is offline crime at its most pervasive, invasive and terrifying. The wealthy and super-wealthy are highly exposed to many types of crime.
HNWs are easy targets in that they can be assailed for any number of reasons. They may be targets of opportunity or expedience (by gangs identifying someone wearing a nice watch or necklace, driving a new car, or leaving a fancy restaurant), or simply be in the wrong place at the wrong time.

But just as many cases of white-collar fraud turn out to be inside jobs, many kidnappings involve people well known to families – neighbours, business contacts or members of household staff. The threat is even more acute for the defenceless, notably children and young adults. They are particularly vulnerable to criminal threats,’ notes Myers.

**A MODERN APPROACH TO RISK**

No threat or danger can be completely removed, but even the worst risks can be anticipated and mitigated. There is a financial cost – but then, personal and financial safety is perhaps the most valuable commodity of all. Bermuda has long been a sanctuary for those seeking to keep their finances and families safe. Its pristine reputation means it is viewed as among the safest jurisdictions for the wealthy.

The North Atlantic island is also home to insurance and reinsurance specialists – such as Hiscox and XL Catlin – that are global in scale and innovative by nature. These organisations are constantly seeking new ways to pinpoint and preempt risk, Myers explains. At Hiscox, we have developed a new security-incident response policy that is far more developed than the old basic kidnap-and-ransom policies. They provide clients access to one of our security-specialist partners, London-based Control Risks Group.’

He adds: ‘We are always developing solutions to new challenges facing companies and individuals across the world, from cyber threats and cyber extortion to piracy and terrorism evacuation. Bermuda’s importance lies in the fact that several of its insurers, including Hiscox, have led the way in developing new security-related insurance products and services.’

XL Catlin is also driving innovation through new insurance and reinsurance policies. Pascal Matthey, a senior marine-risk engineer at the Bermuda-based firm, highlights the rising threat from highly organised maritime gangs. These vary from old-style risks (political uncertainty, terrorism, piracy) to cyber-risk, which has, in a short space of time, he writes on the insurer’s website, become ‘a big concern’ for the marine industry.

‘It is easy to forget that the largest container ships are reliant on computers for navigation. If hackers break into the ship’s operating system, they can change its course, causing delays that may result in significant losses. Matthey cites the example of a Dutch criminal gang that stashed drugs in timber and bananas heading from Latin America to the Port of Antwerp. They then hacked the port’s computer system, allowing the gang to send in truck drivers to extract the contraband as soon as it arrived in Belgium. It took the authorities two years to realise the gang even existed.

**ONLINE v OFFLINE THREATS**

This case underlines the increasingly pervasive and pernicious threat corporates and individuals face from technology-savvy criminals. Cyber is the issue of the day, and rightly so. It is, notes one Bermuda-based lawyer who specialises in corporate security, ‘the big emerging threat. It occupies our minds every day. And the market is responding to the new dangers in all manner of interesting ways.’

Cyber terrorises the legitimate owners of assets (or reputations) in large part because the interconnected nature of the digital age allows criminals to steal assets (and undermine or destroy reputations) from anywhere else on Earth. Hackers may be in Russia or North Korea – or London or New York. ‘It makes people think they aren’t safe,’ the security lawyer adds. ‘Cyber allows organised gangs in emerging markets to bypass traditional security measures – police forces and so on – and directly attack people in developed markets. So in that way, it is levelling the playing field.’

But do we run the risk of overplaying the threat from bullies and gangs operating in cyberspace? Are online dangers really as great or greater than their offline counterparts?

Keith Robinson, a risk solution expert and current Chair of STRP Bermuda, points to the nature of our modern lives, long stretches of which are spent staring into computer screens and scrolling through social media feeds. ‘We are constantly checking our phones, and this can mean we elevate cyber-risks above threats to our physical security,’ he says. ‘But judging by the cases that I come across in the Bermudian courts, risks to our physical well-being remain far more endemic – and damaging and commonplace – than threats emanating from the digital world. We perceive cyber-risk as being far greater than it actually is.’

Risks, nonetheless, are rising, both online and offline, placing added importance on one’s choice of insurer, risk advisor or security consultant. Bermuda is one of the world’s top three reinsurance markets, meaning that it is a jurisdiction that specialises in gauging and pricing risk.

It is also, notes Robinson, an internationally interconnected market that is dominated by a tight-knit group of licensed trust companies – 28 in all, regulated and overseen by the Bermuda Monetary Authority, and providing world-class service to wealthy families around the world, from the Americas to Europe, and Asia to the Middle East. These, in turn, are supported and advised by the best insurers, lawyers and security experts. Risk may be inevitable, but there are few places where it is better understood than in Bermuda.

**VISIBLE IS VULNERABLE**

There’s a final issue at play here: personal exposure. Wealthy individuals have never been more vulnerable to attack (offline
or online) or in greater need of intelligent and highly adaptable security advice. Tsars and emperors had their most loyal, elite soldiers as guards, trained to give their lives to protect their charges. The same is true of the security details that surround modern-day presidents and billionaires.

But wealthy families can also do a lot to moderate the risks they face. Granted, that’s not necessarily easy if your personal brand is your value, forcing you (celebrity, footballer, pop star or tech titan) to spend a large part of your life in the public eye. But Bermuda’s best-in-class security and risk experts offer a range of advice, from the simple to the complex.

A straightforward way of reducing personal risk is to analyse your travel patterns. A good security specialist will lower the chances of you popping up on the radar of criminals, notes Hiscox’s Myers. ‘The single largest way of being vulnerable is to be visible,’ he says. ‘If you are visible, people can start to look at ways to gain access to you. With any crime, there’s something about the victim that typically gains the attention of a criminal, be it geography – living close to the assailant – wearing too much bling, driving a high-end vehicle or simply being photographed showcasing your material possessions.’

It can, of course, be hard, verging on impossible, to hide one’s wealth entirely, notes Robinson. ‘An ultra-high-net-worth family may view its collective life – its earnings and outgoings, cars, and properties – as being quite modest,’ he says. ‘They may not believe they flaunt their wealth.’ But to the wrong eyes, they may well be viewed as a natural target.

As the rueful Mack observes in Grand Canyon, there are so many ways these days to be hit, hacked and harangued by organised gangs or petty criminals – particularly given the connected nature of the modern world. However, just remember: mortal danger may be only a heartbeat away, but good advice, provided in safe jurisdictions such as Bermuda, with its elite echelons of risk and insurance experts, can be even closer.

**ELLiot WilsOn** is a journalist who has written for The Economist and The Spectator.
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The BERMUDA MONETARY AUTHORITY was established in 1969. It is a world-respected regulatory body with responsive, contemporary oversight of financial entities.

USD 35 BILLION
The contribution to US CATASTROPHE losses by Bermuda carriers. Bermuda also provides 35% of capacity for LLOYD’S OF LONDON.

REINSURANCE
Bermuda is one of three top REINSURANCE centres, along with NEW YORK and LONDON.

USD 200 BILLION
The value of funds under administration and management by Bermuda-based ASSET ALLOCATORS.

Bermuda is a growing centre for single- and multi-family offices. Services include innovative insurance and trust structures, philanthropic advisory solutions, and custody and portfolio management.

Bermuda is attracting technology start-ups, biomed companies, e-commerce entities, and nearshore initiatives.

MULTI-INDUSTRY EXPERTISE
Bermuda has a wealth of WORLD-CLASS TALENT, with Big Four accounting firms, auditors, financial advisors, lawyers, IT specialists, actuaries, underwriters, brokers, fund administrators, corporate secretaries and support services.

TREATIES
Bermuda has MORE THAN 100 tax-transparency treaty partners, including bilateral tax information exchange agreements and Multilateral Convention on Mutual Administrative Assistance in Tax Matters co-signatories.

COMPLIANCE LEADER
Bermuda is recognised as a leader on tax transparency and cooperation by the OECD, Financial Action Task Force and G20.

AML and ANTI-TERRORISM FINANCING
Bermuda is compliant with US and UK anti-money laundering and anti-terrorism financing requirements, and has no bank-secrecy laws. Its government-held, central beneficial ownership register, established 70 years ago, enables qualified authorities to share essential information.

FATCA
Bermuda has signed Model 2 intergovernmental agreements with the US and UK under the US Foreign Account Tax Compliance Act.

SOLVENCY II
In 2016, the island achieved full equivalency under Europe’s Solvency II regulatory system for insurers, making it one of only two non-EU jurisdictions with full equivalence.
GLOBALISATION

Bermuda’s economic model supports close to HALF A MILLION JOBS globally, both on the island and in its offshore trading partners.

400 YEARS

The longevity of Bermuda’s LEGISLATIVE SYSTEM, which dates back to the adoption of English and Welsh common law at colonisation in 1612.

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Bermuda has ZERO income, corporate, withholding or capital gains taxes, but does levy payroll tax, import duties, social insurance, and customs duties on goods and services.

WORLD LEADER

Bermuda has the lion’s share of global captive insurers (close to 80%) and insurance-linked securities (USD20 BILLION and growing).

MARKET INNOVATION

Bermuda has a track record of ‘firsts’ - the world’s first CAPTIVE INSURERS, the first EXCESS LIABILITY carriers and the first offshore jurisdiction on the OECD WHITE LIST.

Bermuda is an attractive choice for aircraft registration.

Bermuda is a shipping centre with a full range of maritime services, ship and super-yacht registration, surveys and certification. Bermuda’s ship registry is a Category 1 member of the British Red Ensign Group.

COLLABORATION

Bermuda is a highly collaborative jurisdiction, where industry, government and regulators work closely to facilitate SPEED TO MARKET.

OECD BEPs, COUNTRY by COUNTRY and COMMON REPORTING STANDARD

In 2016, Bermuda adopted OECD standards for base erosion and profit shifting (BEPS) compliance, signing the Declaration to the Multilateral Competent Authority Agreement for the automatic exchange of financial account information via Common Reporting Standard and country-by-country reports.

AIFMD

The Bermuda Monetary Authority has signed agreements with most EU Member States on the Alternative Investment Fund Managers Directive (AIFMD).
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The number of viable offshore centres is set to decline, but Bermuda is well positioned to survive and thrive, explains international tax expert Philip Marcovici
ill all existing offshore financial centres survive? Or is offshore now making way for onshore and so-called ‘midshore’ centres more relevant to a newly transparent world?

The reality is that the global regulatory landscape is fast-evolving, and not every offshore centre will make it through the next few decades. That is probably a good thing. But some financial centres will not merely survive, but excel – and Bermuda is well positioned to be among the most important of these.

So, what will it take for an offshore financial centre to succeed?

THE FAILINGS OF OFFSHORE CENTRES AND WHY BERMUDA IS DIFFERENT

Bermuda was early to buck the trend of offshore centres focused on past practices. Taking advantage of its geographic position and well-developed infrastructure, the island focused on key sectors, such as the insurance industry, and marketed its respected regulatory standards to those seeking something different. In the run-up to 1997 and the return of sovereignty over Hong Kong to China, Bermuda became the jurisdiction of choice for publicly listed groups seeking political-risk protection, such as Jardine Matheson, given the acceptance of Bermuda’s sophisticated corporate laws by listing authorities in Hong Kong. Bermuda’s resistance to competing on the basis of lax regulations provided a number of early wins, and the same philosophy has helped position Bermuda as one of a handful of quality offshore centres.

When we examine challenges currently faced by offshore financial centres and recognise the mistakes many have made, the Bermuda difference becomes clear.

In many jurisdictions around the world, years of abuse of bank-secrecy and other privacy regimes by the offshore corporate-services industry, banks, trust companies and others have led to a regime change – one that is now being dictated by onshore governments whose tax and legal systems have proven compromised on an industrial scale. Had the offshore world taken leadership on the global problem of undeclared money and other regulatory failings, we would be in a very different position. Instead, the leadership of offshore centres not only listened to industry and legacy players, but allowed them to fashion strategy for the future – and in most cases, there was no effective strategy for the future.

Not so in Bermuda, which has always prided itself on compliance with higher know-your-client and transparency standards, along with a collaborative approach to maintaining them. Industry players consult with one another, government and the regulator (the Bermuda Monetary Authority) to determine growth strategies for the island’s international business sector. When the resulting laws and regulations are drafted, reviewed and updated, it is through an inclusive, consultative process.

One of the key characteristics resulting from this teamwork was the decision, more than 40 years ago, to reject the concepts of banking secrecy and opacity, and instead to maintain a non-public beneficial ownership register for corporate clients.
OFFSHORE DEVELOPMENTS

equivalency and more than 100 tax information-exchange agreements.

OFFSHORE VS MIDSHORE: CAN OFFSHORE SURVIVE?

‘Midshore’ financial centres are those whose tax laws make them attractive places in which to establish corporate structures, trusts and other vehicles, while also offering the advantages of being in an onshore location. An effective midshore jurisdiction has infrastructure and human resources in a broad range of areas, and benefits from having long embraced information exchange and effective tax treaties that reduce or eliminate withholding taxes.

Hong Kong, Luxembourg and Singapore are good examples of midshore centres – with significant infrastructure available to support structures established in a transparent world; tax rates that are reasonable; a wide network of tax and investment protection agreements; and more. A focus on substance of structures, and on real activity to support transfer pricing, means locations of choice of the future will be those where human resources are available to meet needs.

Onshore centres are increasingly making themselves attractive as midshore options. The UK, with its low corporate tax rates, and the US, with many regimes permitting tax-and-reporting-free establishment of limited liability companies and trusts, are but two examples.

Similarly, some offshore centres tilt more towards the midshore model. These are the jurisdictions with the necessary infrastructure, talent, reputation and regulation to make them effective. Bermuda stands out as one of these jurisdictions. There is more that Bermuda can do to assure its future success, and its track record suggests it will be among the few to take the proactive steps necessary to continue to develop its role as a trusted financial centre.

There will remain a role for offshore centres, albeit for far fewer than exist today. Bermuda’s focus on families and family businesses, its well-developed trust laws, and its physical characteristics and location make it a unique, elite hub for families and family businesses, offering the right ownership structures, and a perfect location for family retreats and more.

If Bermuda is strategic in focusing on the changing needs of global wealth-owning families, adapting, and negotiating the right bilateral and multilateral agreements, it will not only survive, but thrive.

This article is a modified excerpt from The Destructive Power of Family Wealth, published by John Wiley & Sons in November 2016

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The rising tide

Randall Krebs introduces Bermuda’s recent business and investment fund innovations

Bermuda is a world leader in the insurance-linked securities (ILS) market. This relatively new market arose when Bermuda’s investment funds and insurance/reinsurance industries came together to create ILS investment products, including:
- collateralised reinsurance;
- catastrophe bonds; and
- sidecars (a financial structure whereby investors can take on the risk and return from specific books of insurance or reinsurance business).

Bermuda Business Development Agency research revealed that Bermuda is the most popular jurisdiction for ILS fund managers, with approximately USD55 billion under management. It also continues to lead the way in innovation and product development. In the past few years, Bermuda has updated its investment fund legislation to support its expanding role as a destination in the offshore investment fund ecosystem – in particular:
1. the Limited Liability Company Act 2016 (the LLC Act);
2. amendments to its limited partnership legislation; and
3. the Contracts (Rights of Third Parties) Act 2016.

LLCs

The LLC Act was introduced in response to demand from US stakeholders for a Bermuda offshore limited liability company (LLC). These LLCs look, feel and operate like Delaware LLCs, as the central provisions of the Bermuda law are modelled on Delaware legislation. This allows consistency and efficiency when managers align the terms of the onshore Delaware LLC with those of the offshore Bermuda LLC. Further, although Bermuda’s legislation is new, it comes with the provenance of Delaware’s proven model.

FLEXIBILITY - FREEDOM OF CONTRACT

An LLC is a hybrid structure allowing the contractual and operational flexibility of a partnership to be housed within a corporate entity. A Bermuda LLC is a separate legal entity, and its members (including those involved in management) have limited liability. However, like a partnership, the affairs of a Bermuda LLC are governed by an agreement, rather than by statutorily mandated constitutional documents. In other words, the contractual design allows the flexibility for parties to more easily reflect their commercial agreement in the entity’s constitution. The LLC Act expressly provides that it is to be construed to give maximum effect to the principle of freedom of contract in relation to LLC agreements. Thus, the LLC agreement can fully reflect the parties’ intentions and eliminate many constraints that apply to corporations.

MEMBERS

Although members of a Bermuda company receive shares, members of a Bermuda LLC will each have an interest in a capital account in a similar way to partners in a partnership. Under the LLC Act, parties can create bespoke vehicles. Members have the contractual freedom to set out in the LLC agreement how the relationship between the members will be structured.

MANAGERS

Bermuda LLCs are not required to have separation of ownership and management, and can be managed by their members, so there is no need for a board of directors or a general partner. Similar flexibility exists on the members’ or managers’ duties to the LLC or to each other, as any such duties that would otherwise exist at law or in equity may be expanded, restricted or even eliminated by the LLC agreement (except fraud and dishonesty).

Bermuda LLCs also have a broad power to indemnify members and managers. The LLC Act expressly permits members and managers to vote in their own self-interest.

USES FOR LLCs

LLCs are commonly used in the investment fund industry – for example, an investment feeder fund. A master feeder structure could involve a US LLC feeder and an offshore Bermuda LLC feeder. Due to the similarity with the Delaware legislation, the onshore and offshore LLC agreements could be closely aligned, making formation and administration easier and more efficient.

Due to their flexibility, LLCs can be ideal for other commercial and private client uses, such as:

PRIVATE TRUST COMPANIES

Originally, private trust companies (PTCs) were used by families to administer trusts they had created for succession, governance and holding personal assets. By creating their own trustee company, the family could design their own governance structure, thereby taking comfort that administration of the trust assets would be consistent with their wishes.

PTC structures are attractive to clients from civil-law countries, those wishing to establish a family-office structure, and those who do not wish to use public trust companies. PTCs have also been used in commercial applications to act as a trustee for unit trusts, pension funds, employee benefit plans, insurance trusts, insolvency/escrow arrangements, financing special-purpose vehicles (SPVs), or even for the direct ownership of an operating business.

The LLC legislation now allows even greater flexibility in designing a bespoke management and membership structure that is ideally suited to the family or commercial applications.
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William F. Maycock, President • David G. Goodwin, Vice President
‘Bermuda continues to enact legislation designed to stimulate the growth of international business’

PHILANTHROPY
In 2015, Mark Zuckerberg and his wife, Dr Priscilla Chan, announced that they intended to give away 99 per cent of their shares in Facebook during their lifetimes. They used an LLC, as it gave them more flexibility in investing in for-profit social enterprises and also supporting political causes. The couple also retains control over distributions of income and capital. In many respects, the LLC has the attributes of a private investment vehicle.

TRUST ALTERNATIVE
An LLC can provide an alternative to a traditional trust structure. The LLC agreement can be drafted to reflect the governance/control elements desired by the current generation, with rules for the timing and distribution of capital and income to the next generations. As a corporate structure, it might be more appealing to families from civil-law jurisdictions, and avoid negative implications at times associated with trusts.

HOLDING COMPANY
The Delaware LLC is frequently the vehicle of choice for holding entities in a corporate group. A Bermuda LLC may be an option where it is desirable to have the holding entity established in an international financial centre with tax neutrality, an established/respected legal system and a strong business environment.

JOINT-VENTURE VEHICLE
When structuring a joint venture, an LLC offers the same advantages as a company: it is a body corporate (with legal personality separate from that of its members) and has perpetual existence; the capacity to sue and defend legal proceedings in its own name; and the power to acquire, hold and dispose of property. An LLC offers other advantages:

- partnership-like treatment of profits and losses allowing, for instance, for ease of distributions without having to satisfy onerous capital-maintenance rules;
- flexibility to provide that a person appointed to a board or committee by a particular member may act in the best interests of that member, rather than the LLC as a whole; and
- increased flexibility to specify the extent of duties of board members.

SECURITISATION SPV
A common SPV structure involves a Bermuda purpose trust owning the shares of a Bermuda company. This offers:

- limited liability;
- ‘orphan’ status – as the shares are held by a purpose trust, the underlying asset pool being securitised is off balance sheet and not consolidated with the originator;
- bankruptcy remoteness; and
- the ability to restrict the SPVs objects and powers so it can only enter into the specific transactions related to the securitisation.

By using an LLC, there is more flexibility to draft the LLC agreement to mesh with the unique requirements of the securitisation transaction. Further, since the purpose trust would hold a membership interest, rather than shares, the SPV’s ‘orphan’ status is clearer.

PARTNERSHIP LEGISLATION
Bermuda’s partnership legislation was updated in 2015 and tweaked in 2016. The reforms aimed to enhance Bermuda’s product offering and competitiveness. Legislative amendments included:

- the Partnership Amendment Act 2015;
- the Exempted Partnerships Amendment Act 2015;
- the Limited Partnership Amendment Act 2015; and
- the Partnerships and Companies Amendment Act 2016.

The amendments bring greater flexibility in the management and operation of partnerships by giving them rights similar to those enjoyed by companies, including:

- more flexibility for internal governance and clarity on partner responsibilities;
- conversion to and from exempted limited companies;
- the establishment of a register of charges for partnerships with separate legal personality; and
- continuance and discontinuance procedures, i.e. partnership relocation to and from Bermuda.

CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 2016
This Act allows parties to vary the common-law doctrine of ‘privity of contract’ so that third parties (who are not a party to the contract) can enjoy the benefits and enforce the provisions of a contract (including indemnification and exculpation provisions). These rights arise if the third party is expressly identified in the contract and the contract expressly provides that the third party can enforce the contract’s terms. This Act is appealing to the investment funds industry, as fund documents regularly include indemnities in favour of third parties. It is also attractive to third-party service providers, advisors and consultants.

SOLVENCY II
In 2016, the EU awarded Bermuda equivalency with its own EU Solvency II insurance regime (Switzerland is the only other non-EU country with equivalency). Similarly, the US National Association of Insurance Commissioners has designated Bermuda a ‘qualified jurisdiction’.

CONCLUSION
Bermuda continues to enact legislation designed to stimulate the growth of international business and keep the jurisdiction globally competitive amid ever-changing market demands.
Acts of clarity

A raft of global legislation is ushering in a new era of greater financial transparency. But what does that mean for privacy? By Hugh Tomlinson QC and Kirsten Sjøvoll
interest and the private interests of individuals. That must be done carefully, ensuring that the rights in play are properly protected.

THE ‘TRANSPARENCY TURN’
The past decade has seen growing pressure on governments around the world to increase ‘financial transparency’ by means of central registers of beneficial ownership. This has been driven by concerns about terrorist financing, money laundering and tax evasion.

In February 2012, the Financial Action Task Force (FATF) made recommendations in its publication *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.* Recommendation number 25 provided that, to combat money laundering or terrorist financing, countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and ‘designated non-financial businesses and professions’.

In 2013, one of the ‘themes’ of the UK presidency of the G8 was ‘ensuring greater transparency’. In July that year, the UK government proposed rules requiring companies to obtain and hold information on who owns and controls them, and to implement a central registry of company beneficial ownership information. In April 2014, then Prime Minister David Cameron wrote to British Overseas Territories and Crown Dependencies urging them to follow the UK’s example in establishing beneficial ownership registers.

In May 2015, the EU adopted the Fourth Anti-Money Laundering Directive,† which requires beneficial ownership of companies to be held in a central register. The UK’s register of beneficial ownership of companies came into force in April 2016.

At present, the EU is considering a draft Fifth Anti-Money Laundering Directive, which would require registers of beneficial ownership of trusts that would be accessible to journalists. This is subject only to narrow exceptions.

All these initiatives undoubtedly give rise to greater transparency of information about the ownership of assets. They also constitute very considerable interferences with privacy.

THE RIGHT TO PRIVACY
Privacy is a fundamental human right. It is found in human-rights instruments such as article 8 of the *European Convention on Human Rights* and article 17 of the *International Covenant on Civil and Political Rights.* Similar provisions are included in the constitutions or ‘bills of rights’ of almost every country in the world.

The general test as to whether the right to privacy is engaged is whether there is a ‘reasonable’ expectation of privacy. Everyone has a reasonable expectation that their financial or tax affairs will remain private. A similar expectation of privacy arises in relation to the nature and identity of a person’s assets. Disclosure to the public of information about a person’s wealth may have a very substantial impact on their private life. Indeed, the case law of the European Court of Human Rights goes further: it establishes that the mere gathering and retention of private information on a central database is an interference with privacy.

In other words, the storage and disclosure of information about an individual’s beneficial ownership of shares, or beneficial interests under a trust, interfere with privacy rights. Such interferences require ‘justification’. They must be in accordance with law, for a legitimate purpose, and ‘necessary and proportionate’.

Any statutory provision for a register of beneficial ownership would clearly be in accordance with law. The purpose of such registers is, as the FATF recommendations make clear, to prevent the misuse of legal persons for money laundering or
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‘Registers of beneficial interests under trusts are difficult to justify. The privacy interferences are potentially very substantial’

terrorist financing, and would obviously be legitimate.

The question of necessity and proportionality is more complex, and depends on the precise nature of the register and the degree of public availability of its contents. It is important to be clear that a desire for ‘transparency’ cannot, of itself, be a reason for interfering with privacy rights: if there were complete transparency, there would be no privacy.

In relation to trading companies, there are strong arguments in favour of making beneficial ownership information available to potential trading partners in order for them to be able to assess properly the commercial risks of entering into trading relationships with a company.

Registers of beneficial interests under trusts are much more difficult to justify. The privacy interferences are potentially very substantial. Trusts serve a wide range of purposes that are often related to private family arrangements. These include: inheritance planning, the ownership of family businesses and the ability to control assets where the beneficiaries are vulnerable.

It is arguable, on the assumption that proper privacy protection is provided in relation to the register’s contents, that a requirement that the register be accessible to competent authorities for the purposes of investigating and detecting crime would be necessary and proportionate.

The position is very different in relation to public registers of the beneficiaries of trusts. The identification of beneficiaries on such a register would expose them to a number of potential risks. It could make them targets for kidnapping, fraud or other criminal activity. Information about the trust and the beneficiaries may disclose private family arrangements.

The EU proposals in the draft Fifth Anti-Money Laundering Directive provide two kinds of ‘protection’ in relation to beneficial ownership registers of trusts.

The first is that access to the register is confined to a person or organisation that can demonstrate a ‘legitimate interest’. The draft Directive provides no definition of ‘legitimate interest’, but it is clearly envisaged that this would include the media and non-governmental organisations (NGOs).²

The problem is that, in practice, there is no way of drawing a clear line between ‘responsible’ NGOs and media organisations, and those who wish to use beneficial ownership information for improper purposes. An entertainment journalist, blogger or any individual taking on the role of citizen journalist’ with an interest in the financial or tax affairs of others would have a ‘legitimate interest’ of the kind contemplated by the proposed measure. This means that this protection is ineffective.

Second, the draft Directive states that Member States can provide for exemptions to access to the register where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable.⁴

The problem with this is that it does not cover other cases of substantial interference with privacy rights. To take three examples:

[Hugh Tomlinson QC and Kirsten Sjøvoll are members of Matrix Chambers]

1. Directive (EU) 2005/60 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing
2. See, for example, in the English domestic context, Revenue and Customs Commissioners v Banerjee [2003] ELR 151
3. See also Joined Cases C-257/09 and C-331/09, Volker and Markus Schacke v Gérard and Anor v Land Hessen, 9 November 2010 (58) Disclosure of income constitutes interference with private life within the meaning of article 7 of the Charter of Fundamental Rights of the European Union
4. See, for example, MN v San Marino, App No 38005/13, 7 July 2015 [51] and [53]
5. See Recitals 25 and 25 to the draft Directive
6. Article 34(4)
Interview: Sir Russell Coutts

As CEO at the America’s Cup Event Authority, Sir Russell Coutts helped to mastermind the sailing spectacle that was the biggest thing to happen to Bermuda in 2017. A veteran of the Cup, he is no stranger to incredible maritime venues, yet he was blown away by the island as an amphitheatre for this iconic sporting battle. Olympic gold medallist Coutts won the America’s Cup three times as skipper and helmsman. Here, he tells Penelope Rance what makes both the trophy, and host Bermuda, unique.

WHAT MAKES THE AMERICA’S CUP A SINGULAR SPORTING EVENT?
The scale of the challenge makes the America’s Cup unique. It’s an international sporting event that dates back to 1851, yet only four nations have ever won it. It’s arguably one of the hardest events to win in sport, and it’s not just about sailing well – there’s a massive engineering challenge in designing, developing and building the fastest boat.

As the competition for the oldest trophy in international sport, the event carries tradition and prestige. It predates the modern Olympic Games by 45 years, and the first race was watched by Queen Victoria.

As we expected when Bermuda was selected to host the event, the island embraced the America’s Cup with great pride and warmth. Off the water, the purpose-built America’s Cup Village, with all of the team bases, the public viewing areas and hospitality facilities, was a superb place to spend a few days watching the racing, and to cool off with a famous Bermudian dark and stormy cocktail.

Bermuda did a tremendous job of making it a very special experience for visitors, and I think anyone who came will have a lifetime memory of this magical place.

WHAT WILL THE LEGACY OF THE AMERICA’S CUP BE IN BERMUDA?
One of the events I was most excited about was the America’s Cup Endeavour Program. This is an initiative using sailing to inspire and educate thousands of children in Bermuda and around the world.

By the end of 2017, the programme will have given thousands of young people the chance to try sailing, and we featured America’s Cup Endeavour Regattas on the final weekends of the Cup. Hundreds of kids came to Bermuda from around the world to take part in those regattas, and we may even see one or more of those young people racing in the America’s Cup one day.
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